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No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MARTIN W. MATZEN
ANNE S. ALMY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether Section 318(b)(6)(A) of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747 (1989), which provides interim statutory standards not subject to judicial review for management of national forest timber sales that had been challenged in pending federal court actions, violates the constitutional principle of separation of powers.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Pilchuck Audubon Society, Washington Environmental Council, Washington, Native Plants Society, Oregon Natural Resources Defense Council Inc., Portland Audubon Society, Lane County Audubon Society, and Siuslaw Task Force were plaintiffs in the district court (W.D. Wash.) and appellants in the court of appeals. Washington Contractor Loggers Association and William Pickell were also plaintiffs in the district court and appellees in the court of appeals.

Portland Audubon Society, Headwaters, Lane County Audubon Society, Oregon Natural Resources Council, Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council were plaintiffs in the district court (D. Or.) and appellants in the court of appeals. Northwest Forest Resource Council, Huffman & Wright Logging Co., Freres Lumber Co., Inc., Lone Rock Timber Co., Inc., Scott Timber Co., Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Inc., Douglas County Forest Products Company, Medford Corporation, Rogge Forest Products, Inc., Association of O & C Counties, and Benton County were defendants/intervenors in the district court and appellees in the court of appeals.

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No.

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of F. Dale Robertson, Chief, United States Forest Service, the United States Forest Service, Department of Agriculture, and Manuel Lujan, Jr., Secretary of the Interior,[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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[1] The caption of the court of appeals' opinion erroneously omitted Manuel Lujan, Jr., Secretary of the Interior, as a defendant-appellee in the consolidated appeal from the judgment of the United States District Court for the District of Oregon, *Portland Audubon Society* v. *Lujan*, No. CV-87-1160-FR (D. Or. Dec. 21, 1989).

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-17a) is not yet reported. The initial opinion of the court of appeals is reported at 914 F.2d 1311. The opinion and order of the district court in *Seattle Audubon Society* v. *Robertson*, No. 89-160WD (W.D. Wash.) (App., *infra*, 20a-28a, 29a-34a) are unreported. The opinion of the district court in *Portland Audubon Society* v. *Lujan*, No. 87-1160-FR (D. Or.) (App., *infra*, 35a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1990. Petitions for rehearing were denied on January 16, 1991. App., *infra*, 18a-19a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

STATUTORY PROVISION INVOLVED

Section 318(b)(6)(A) of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747 (1989), provides:

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[2] Before the court of appeals denied the petitions for rehearing, the government applied for an extension of time within which to file a petition for a writ of certiorari. On December 10, 1990, Justice O'Connor granted that application, thereby extending the deadline to and including February 15, 1991. The court of appeals' order denying the timely petitions for rehearing on January 16, 1991, however, superseded the extended deadline for seeking certiorari under Rule 13.4 of the Rules of this Court. See also *Missouri* v. *Jenkins*, 110 S. Ct. 1651, 1660-1662 (1990); Fed. R. App. P. 40(a); 9th Cir. Local R. 35-3 Advisory Committee Note.

> Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 745-750 (1989), is reproduced in its entirety at App., *infra*, 43a-55a.

STATEMENT

This case involves "the ongoing controversy over logging in old growth forests in Oregon and Washington and the impact of that logging on the northern spotted owl." App., *infra*, 5a. Old-growth forests provide natural habitat for the northern spotted owl—a threatened species.[3] In the late 1980's respondents, the Seattle Audubon Society, the Portland Audubon Society, and other environmental groups, filed actions in the Western District of Washington and the District of Oregon challenging the federal government's effort to continue logging old-growth timber in government-owned forests located in the Pacific Northwest.

During the pendency of those federal court proceedings, Congress enacted Section 318 of the Department of the Interior and Related Agencies Appriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 745-750 (1989), also known as the Northwest Timber Compromise. Section 318, as described by Congress, "sets terms and conditions applicable only for fiscal year 1990 for making timber sales on Federal lands in Oregon and Washington, for managing habitat for northern spotted owls, and for minimizing fragmentation of significant old-growth forest stands." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 87 (1989). In light of directives set forth in Section 318, the district courts concluded that the statute by its terms precluded respondents' claims for relief.

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[3] In June 1990, during the pendency of respondents' lawsuits, the United States Fish and Wildlife Service listed the northern spotted owl as a threatened species under the Endangered Species Act, 16 U.S.C. 1531 *et seq.* See 55 Fed. Reg. 26,114 (1990).

The Ninth Circuit reversed, holding that Section 318(b)(6)(A) violates the constitutional principle of separation of powers set forth in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). The court of appeals determined that Section 318(b)(6)(A) "does not establish new law, but directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court." App., *infra*, 14a. In the court's view, "[t]his is what *Klein* and subsequent cases agree is constitutionally proscribed." *Ibid.* Accordingly, the court of appeals remanded for consideration of the merits of respondents' challenges.

A. Initial Proceedings in the District Courts and Court of Appeals

1. *Seattle Audubon Society* v. *Robertson*

In February 1989, respondents filed an action against the Chief of the United States Forest Service, Department of Agriculture, in the United States District Court for the Western District of Washington.[4] Respondents contended that the Forest Service's plan for managing northern spotted owl habitat in the national forests located in Washington and Oregon violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 *et seq.*, and the National Forest Management Act of 1976 (NFMA), 16 U.S.C. 1600 *et seq.*[5] Respondents

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[4] This action mirrored a previously filed action against the Secretary of the Interior that was pending in the District of Oregon. See pp. 6-7, *infra*.

[5] The Washington Contract Loggers Association filed a similar action against the Forest Service, "challenging the

sought declaratory and injunctive relief, barring the Forest Service from implementing its plans. App., *infra*, 6a, 30a-32a.

In a series of rulings issued in the spring of 1989, the district court enjoined 163 planned timber sales in Washington and Oregon. Those sales involved sites containing 40 acres or more of old-growth timber. App., *infra*, 6a, 30a-33a.

2. *Portland Audubon Society* v. *Lujan*

In October 1987, respondents had filed a similar action against the Secretary of the Interior in the United States District Court for the District of Oregon. Respondents principally contended that the Bureau of Land Management's decision to continue logging old-growth timber on BLM-managed lands in western Oregon, on the basis of timber management plans that had not adequately considered the detrimental effects to the northern spotted owl population, violated NEPA.[5] Respondents sought declaratory and injunctive relief barring the Secretary from continuing to implement his plans for logging old-growth timber on BLM-managed lands in Oregon. App., *infra*, 5a, 36a-37a.

In April 1988, the district court dismissed the action, holding that Section 314 of the Department of the Interior and Related Agencies Appropriations

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[Service's] guidelines as overly restricting timber harvesting." App., *infra*, 6a. The district court consolidated that action with respondents' lawsuit. *Id.* at 31a.

[5] Respondents also alleged claims under the Oregon and California Lands Act (OCLA), 43 U.S.C. 1181a *et seq.*, the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 *et seq.* App., *infra*, 5a, 36a-37a.

Act, 1988, Pub. L. No. 100-202, Tit. III, 101 Stat. 1329-254 (1987), precluded judicial review of respondents' claims.[7] In January 1989, however, after granting respondents' request to enjoin temporarily certain timber sales pending appeal, the court of appeals reversed and remanded for further proceedings. *Portland Audubon Society* v. *Hodel*, 866 F.2d 302 (9th Cir.), cert. denied, 109 S. Ct. 3229 (1989).[8]

On remand in May 1989, the district court again dismissed respondents' action on the basis of the statutory bar contained in Section 314. *Portland Audubon Society* v. *Lujan*, 712 F. Supp. 1456 (D. Or. 1989). In September 1989, the court of appeals affirmed the district court's dismissal of respondents' NEPA claim, but reversed and remanded the court's

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[7] In pertinent part, Section 314 provided that

> there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further*, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

101 Stat. 1329-254.

Congress later reenacted that express provision. See Department of the Interior and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-446, Tit. III, § 314, 102 Stat. 1825-1826; Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, § 312, 103 Stat. 743. The validity and effect of that provision is not at issue here.

[8] The court of appeals also vacated the previously entered stay "without prejudice to any appropriate renewed efforts by [respondents] to obtain such temporary remedies, if any, as the district court may deem necessary and proper." 866 F.2d at 309-310.

dismissal of respondents' claims under OCLA, FLPMA, and MBTA. *Portland Audubon Society* v. *Lujan*, 884 F.2d 1233 (9th Cir. 1989), cert. denied, 110 S. Ct. 1470 (1990).[9]

B. Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990

In the midst of the disruption caused by the federal court injunctions issued in the course of respondents' lawsuits, Congress enacted Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 745-750 (1989), in order to "balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted owl and significant old growth forest stands." H.R. Conf. Rep. No. 264, *supra*, at 87. Consequently, as effective October 23, 1989, Section 318 "sets terms and conditions applicable only for fiscal year 1990 for making timber sales on Federal lands in Oregon and Washington, for managing habitat for northern spotted owls, and for minimizing fragmentation of significant old-growth forest stands." *Ibid.*

1. Section 318 requires the United States Forest Service to sell a certain amount of timber in Washinton and Oregon national forests, including timber in areas "known to contain northern spotted owls." § 318(a)(1), 103 Stat. 745. The statute also establishes standards for governing the Forest Service's choice of particular sites for proposed sales. § 318

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[9] During the course of this expedited appeal, the court of appeals had stayed further timber sales on the BLM-managed lands at issue. 884 F.2d at 1234. The court vacated that stay when it issued its final decision. *Id.* at 1242.

(b)(1) and (2), 103 Stat. 745-746.[10] In order to protect the 1990 timber sale programs from litigation disruptions, Section 318(g) provides streamlined judicial review procedures. In particular the statute prohibits federal courts from issuing any

> restraining order or preliminary injunction * * * with respect to any decision * * * [regarding] timber sales in fiscal year 1990 from the thirteen national forests in Oregon and Washington and [BLM] lands in western Oregon known to contain northern spotted owls.

§ 318(g)(1), 103 Stat. 749. On the other hand, the statute provides that courts

> shall have authority to enjoin permanently, order modification of, or void an individual sale if it has been determined by a trial on the merits that the decision to prepare, advertise, offer, award, or operate such sale is arbitrary, capricious, or otherwise not in accordance with law.

§ 318(g)(1), 103 Stat. 749.[11]

2. Section 318 also contains specific provisions regarding respondents' pending federal court actions.

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[10] Section 318(b)(3) forbids timber sales in those spotted owl habitat areas located in Washington and Oregon identified by the Forest Service as a result of a formal administrative decision issued in December 1988. 103 Stat. 746. Section 318(b)(3) also forbids such sales in additional portions of national forests identified in the statute. 103 Stat. 746. Section 318(b)(5) forbids timber sales in those BLM-managed lands in Oregon that both the BLM and the Oregon Department of Fish and Wildlife agreed in December 1987 contained spotted owl habitat. 103 Stat. 746-747.

[11] The statute calls for expedited review of challenged timber sales. § 318(g)(1), 103 Stat. 749-750.

As an initial matter, Congress declined to "pass[] on the legal and factual adequacy of [the Forest Service's formal administrative December 1988 decision and the December 1987 agreement between BLM and Oregon state authorities]," each of which formed part of the substantive standards provided in Section 318(b). § 318(b)(6)(A), 103 Stat. 747. Congress next specifically

> determine[d] and direct[ed] that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and [BLM] lands in western Oregon known to contain northern spotted owls *is adequate consideration for the purpose of meeting the statutory requirements that are the basis for* [respondents' pending federal court actions].

§ 318(b)(6)(A), 103 Stat. 747 (emphasis added).[12] Congress further emphasized its goal of streamlining the pending actions, providing that "[t]he guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." § 318(b)(6)(A), 103 Stat. 747.

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[12] With respect to the *Seattle Audubon Society* litigation, Congress directed the parties to try to agree on a list of sales subject to the outstanding injunction that would provide at least 1.1 billion board feet of timber for fiscal year 1990. § 318(f), 103 Stat. 748-749. The statute further provided that "[s]elected sales shall be prepared, advertised, offered, awarded and operated notwithstanding any provision of law that is [the] basis for any stay, injunction or order issued [in the *Seattle Audubon Society* action]." § 318(f)(3), 103 Stat. 749.

C. District Court Proceedings In Light Of Section 318

1. *Seattle Audubon Society* v. *Robertson*

As a result of the express provisions of Section 318, the government in October 1989 asked the district court to vacate the preliminary injunction it had previously entered barring the 163 planned timber sales in Washington and Oregon. Respondents countered that Section 318(b)(6)(A) is unconstitutional, contending that Congress impermissibly directed the result in pending actions and otherwise unlawfully barred judicial review of the one-year guidelines established by the statute. App., *infra*, 23a.

In November 1989, the district court granted the government's motion, rejected respondents' constitutional challenge, and vacated the preliminary injunction. App., *infra*, 20a-28a, 29a-34a. The court concluded that Section 318(b)(6)(A) "does not require a particular decision on the issues of this case." *Id.* at 24a. On the contrary, the court determined, "Congress has adopted the Forest Service's proposed guidelines, challenged by [respondents], as statutory law for a period of one year." *Ibid.* Congress has "the power to do this," the court recognized, since "[j]ust as Congress may create a geographic exception to the environmental laws, it may also create a temporal exception." *Ibid.* The court also rejected respondents' contention that the statute's bar to judicial review is unconstitutional, noting that Congress may restrict federal court jurisdiction, and that Section 318(b)(6)(A) "means only that, as new statutory law, the guidelines [mandated in subsections (b)(3) and (b)(5)] cannot be tested in court for compliance with the National Forest Management

Act, [NEPA], or other general environmental statutes." App., *infra*, 25a-26a.[13]

2. *Portland Audubon Society* v. *Lujan*

In the district court, the government similarly sought dismissal of respondents' pending claims in view of newly enacted Section 318. Respondents contended that Section 318(b)(6)(A), which in their view prescribed a rule of decision in the pending action, violates the constitutional principle of separation of powers. App., *infra*, 37a.

In December 1989, the district court granted the government's motion and dismissed as moot for fiscal year 1990 respondents' statutory claims. App., *infra*, 35a-42a. The court rejected respondents' constitutional challenge, adopting the "reasoning and result" of the district court in the *Seattle Audubon Society* case. *Id.* at 37a.[14]

D. The Court Of Appeals Decision

In September 1990, the court of appeals reversed, holding that Section 318(b)(6)(A) violates the constitutional principle of separation of powers. App., *infra*, 1a-17a. Relying principally on *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), and *United States* v. *Sioux Nation*, 448 U.S. 371 (1980), the court stated that the

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[13] In January 1990, the district court certified respondents' constitutional challenge to Section 318(b)(6)(A) for interlocutory appeal under 28 U.S.C. 1292(b). App., *infra*, 8a.

[14] Respondents noted an appeal from the district court's final judgment dismissing their action. The court of appeals later consolidated the separate appeals noted from the Seattle and Portland actions. App., *infra*, 8a.

> critical distinction, for purposes of deciding the limits to Congress' authority to affect pending litigation through statute, is between the actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case, without repealing or amending the law underlying the litigation, which is not permissible.

App., *infra*, 11a-12a.

Turning to Section 318(b)(6)(A), the court determined that the statute "does not, by its plain language, repeal or amend the environmental laws underlying this litigation." App., *infra*, 13a. To the contrary, the court stated that "[t]he clear effect of subsection (b)(6)(A) is to direct [the court] that, if the government follows the plan incorporated in subsection (b)(3) and (b)(5), then the government will have done what is required under the environmental statutes involved in these cases." *Ibid.*

Having construed the statute in this manner, the court concluded that "[i]n this way Congress, through Section 318, seeks to perform functions reserved to the courts by Article III of the Constitution." App., *infra*, 14a. In other words, Section 318(b)(6)(A) "does not establish new law, but directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court." App., *infra*, 14a. In the court's view, "[t]his is what Klein and subsequent cases agree is constitutionally proscribed." *Ibid.*[15]

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[15] The court made clear that its holding extended only to the "first sentence of subsection 318(b)(6)(A)." App., *infra*, 17a. The court "express[ed] no opinion on the validity of the second and final sentence of subsection (b)(6)(A)." *Id.* at 17a n.4.

Finally, the court of appeals noted that "even if [it] could interpret section 318 as a temporary repeal of the environmental laws at issue in the underlying litigation, then section 318 would amount to an implied partial repeal of the environmental statutes." App., *infra*, 16a. Relying on *TVA* v. *Hill*, 437 U.S. 153 (1978), and circuit precedent, the court stated that Congress could not partially repeal substantive law in an "appropriations measure." *Ibid.*[16]

E. District Court Proceedings On Remand From Court Of Appeals' Invalidation Of Section 318(b)(6)(A)

1. *Seattle Audubon Society* v. *Robertson*

Several days after the court of appeals issued its mandate, the district court rejected respondents' challenge to six 1990 timber sales on the ground that they were untimely under the 15-day limitations period set forth in Section 318(g)(1), 103 Stat. 749. *Seattle Audubon Society* v. *Robertson*, No. 89-160WD (W.D. Wash. Sept. 29, 1990). Respondents' appeal from that judgment is pending before the court of appeals. *Seattle Audubon Society* v. *Robertson*, No. 90-35774 (9th Cir.) (argued Feb. 11, 1991). In that appeal, respondents take the position that the limitations period is subject to equitable tolling. Respondents have thus suggested that if their position prevails, they will seek to challenge any number of 1990 timber sales. See, *e.g.*, Resp. C.A. Reply Br. 9 n.7.[17]

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[16] Before denying petitions for rehearing in January 1991, App., *infra*, 18a-19a, the panel issued an order amending its opinion, *id.* at 3a-4a. The opinion reprinted in the Appendix, *id.* at 4a-17a, incorporates these amendments.

[17] In connection with the ongoing litigation, respondents have recently sought from the Forest Service information

Respondents also renewed their substantive claims regarding otherwise timely challenges under Section 318(g)(1) to twelve 1990 timber sales. In December 1990, the district court set aside those sales for violations of NEPA, NFMA, MBTA. *Seattle Audubon Society* v. *Robertson*, No. 89-160WD (W.D. Wash. Dec. 19, 1990), appeal filed (9th Cir. Feb. 15, 1991).[18]

2. ***Portland Audubon Society* v. *Lujan***

In December 1990, the district court entered an order vacating its previous dismissal of respondents' action. *Portland Audubon Society* v. *Lujan*, No. 87-1160-FR (D. Or. Dec. 1990). Respondents' action, which appears to challenge any number of 1990 and 1991 timber sales that contain spotted owl habitat, remains pending before the court. In connection with that ongoing litigation, respondents have recently sought from the BLM information regarding all fiscal year 1990 timber sales on which there remains uncut timber. Resps. Second Set of Interrogatories, *Portland Audubon Society* v. *Lujan*, No. 87-1160-FR (D. Or.) (filed Jan. 3, 1991).[19]

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regarding all fiscal year 1990 timber sales on which there remains uncut timber. Resps. Second Set of Interrogatories, *Seattle Audubon Society* v. *Robertson*, No. 89-160WD (W.D. Wash.) (filed Jan. 3, 1991).

[18] The district court recently rejected the government's motion to vacate the injunction regarding the twelve 1990 timber sales. *Seattle Audubon Society* v. *Robertson*, No. 89-160WD (W.D. Wash. Mar. 7, 1991).

[19] There is one other challenge to 1990 timber sales pending in the District of Oregon. See *Citizens Interested in Bull Run* v. *Edington*, No. 90-844-MA (D. Or.). The district court recently resolved another such challenge in the govern-

REASONS FOR GRANTING THE PETITION

The court of appeals has held an Act of Congress unconstitutional. The court of appeals' holding—that Section 318(b)(6)(A) prescribes a rule of decision in violation of the constitutional principle set forth in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871)—misapprehends the statutory terms, invokes a substantially overbroad interpretation of the *Klein* decision, and conflicts with other federal courts' applications of that nineteenth century precedent. Moreover, the court of appeals' decision has undermined Congress's interim solution for averting a devastating crisis to the timber industry and local economies of the Pacific Northwest. Given the confusion among the lower courts regarding the reach of *Klein*'s constitutional proscription, and the looming threat to the stability of the timber industry and economies of the Pacific Northwest occasioned by the court of appeals' decision, review by this Court is warranted.[20]

1. a. In its haste to strike down Section 318 (b)(6)(A) as unconstitutionally prescribing a rule of decision, the court of appeals misapprehended the

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ment's favor. See *Oregon Natural Resources Defense Council* v. *United States Forest Service*, No. 90-904-RE (D. Or. Apr. 2, 1991).

[20] Although Section 318 expired by its terms at the close of fiscal year 1990, this controversy remains live and justicable. Section 318(k), 103 Stat. 750, provides that "[t]imber sales offered to meet the requirements of subsection (a) of this section shall be subject to the terms and conditions of this section for the duration of those sales contracts." Moreover, respondents have successfully enjoined a number of 1990 timber sales as a result of the court of apeals' decision and are endeavoring to block or undermine additional 1990 sales. See pp. 14-15, *supra*; pp. 25-26, *infra*.

statutory terms. By its terms, Section 318(a) *requires* the Forest Service and BLM to sell during fiscal year 1990 a certain amount of timber in Washington and Oregon forests, including timber in areas "known to contain northern spotted owls." § 318(a)(1), 103 Stat. 745.[21] Section 318(b) then sets the applicable statutory guidelines for the federal government's choice of particular sites for proposed 1990 sales. In particular, Section 318(b)(1) directs the Forest Service to use its discretion in selecting sites to minimize "fragmentation" of old-growth timber, 103 Stat. 745-746, and Sections 318(b)(3) and (5) then carve out specific forest areas to be excepted from the available offering sites, 103 Stat. 746-747.[22] Section 318(b) thus provides the governing plans for 1990 timber sales offered by the Forest Service and BLM in the forests at issue in respondents' pending lawsuits. And in the final sentence of Section 318(b)(6)(A), Congress expressly insulated those plans from judicial review.

Section 318—by its terms—therefore disabled the Forest Service and BLM during 1990 from imple-

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[21] The statute specifically mandates that a substantial portion of the specified sales level of more than 7 billion board feet of net merchantable timber (70% or 5.8 billion board feet) must be "offered from the thirteen national forests in Oregon and Washington known to contain northern spotted owls." § 318(a)(1), 103 Stat. 745.

[22] In particular, Congress excepted those spotted owl habitat areas located in Washington and Oregon previously identified by the Forest Service in December 1988, and others listed in subsection (b)(3), Section 318(b)(3), 103 Stat. 746, and those BLM-managed lands in Oregon that both the BLM and state authorities previously agreed in December 1987 contained spotted owl habitat, Section 318(b)(5), 103 Stat. 746-747.

menting the particular timber management plans respondents were challenging in their pending federal court actions. Instead, the statute "provides that for fiscal year 1990 the new standards adopted by Congress in subsections (b)(3) and (b)(5) will apply, and will be adequate for that year." App., *infra*, 24a. Those new standards, which respondents could not challenge because the final provision of Section 318 (b)(6)(A) insulates them from judicial review, amounted to nothing other than a "temporary modification of the environmental laws." App., *infra*, 25a. The court of appeals thus needlessly and erroneously created a constitutional question by construing Section 318 as "direct[ing] the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court." *Id.* at 14a.

b. The court of appeals avoided this straightforward reading of Section 318 by invoking the "doctrine disfavoring repeals by implication," particularly where the "subsequent legislation is an *appropriations* measure." *TVA* v. *Hill*, 437 U.S. 153, 190 (1978); See App., *infra*, 16a. In *Hill*, the Court applied that doctrine in circumstances where the appropriations statute itself contained no language exempting the federal project at issue from the requirements of the Endangered Species Act; the only suggestions of intent to create such an exemption were in the appropriations statute's legislative history. 437 U.S. at 189-191, 195.

Here, by contrast, the express terms of Section 318 displace, for fiscal year 1990, the requirements of environmental statutes otherwise applicable to timber sales in the Pacific Northwest. This Court has long recognized that "when Congress desires to suspend or

repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.'" *United States* v. *Will*, 449 U.S. 200, 222 (1980) (quoting *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940)); see *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883). The court of appeals therefore erred in relying on the canon of construction utilized in *Hill*, and in disregarding the express terms of Section 318 by virtue of that provision's pedigree.

2. The court of appeals compounded its erroneous construction of Section 318 by invoking a substantially overbroad interpretation of this Court's decision in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). The court's treatment of *Klein*, which cannot be squared with other circuits' reading of that decision, highlights the need for this Court to revisit what has become a confusing precedent.

a. In the wake of the Civil War, Congress enacted legislation giving former owners of property seized by the government, on proof of loyalty, a right of action to recover proceeds from the federal government's sale of their property. This Court held that a presidential pardon was sufficient proof of loyalty entitling its recipient to recover. *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1869).

In 1865, Klein, the administrator of Wilson's estate, filed a petition to collect the proceeds from the sale of Wilson's cotton seized by the Union during the war. In 1868, the Court of Claims determined that although Wilson had been disloyal to the Union, a presidential pardon entitled the estate to recover the proceeds. *Wilson* v. *United States*, 4 Ct. Cl. 559 (1868). Pending the government's appeal from that judgment to this Court, Congress enacted a statute providing that

no presidential pardon should be admissible as proof of loyalty, that acceptance without written protest or disclaimer of a pardon reciting that the claimant took part in or supported the rebellion in fact should be conclusive evidence of the claimant's disloyalty, and that the Court of Claims and this Court must dismiss for want of jurisdiction any pending claims based on a presidential pardon. Act of July 12, 1870, ch. 251, 16 Stat. 235; see *Klein*, 80 U.S. (13 Wall.) at 132-134, 143-144.

In affirming the Court of Claims' judgment for Wilson's estate, this Court declared the 1870 statute unconstitutional. *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). First, Congress had exceeded its constitutional power to limit the Court's appellate jurisdiction:

> It is evident * * * that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.
>
> It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.
>
> * * * * *
>
> Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? The question seems to us to answer itself.

Klein, 80 U.S. (13 Wall.) at 146-147. Second, the Court held that the rule of decision at issue—which "impair[ed] the effect of a pardon"—impermissibly "infring[ed] the constitutional power of the Executive." *Id.* at 147.

b. The *Klein* decision "is not a model of clarity." P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 369 (3d ed. 1988). Indeed, this Court has not interpreted *Klein* with one voice. First, the Court has treated the decision narrowly as holding that Congress may not "attempt to prescribe to the judiciary the effect to be given to a [presidential] pardon, in regard to a matter in which the pardon extended." *Hart* v. *United States*, 118 U.S. 62, 66 (1886); accord *Carlisle* v. *United States*, 83 U.S. (16 Wall.) 147, 152 (1872); see *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 467 (1989) (Kennedy, J., concurring in the judgment). Second, *Klein* has been described broadly as holding that Congress may not "attempt to invade the judicial province by prescribing a rule of decision in a pending case." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568 (1962) (plurality opinion).

Finally, the Court has read *Klein* as resting on an amalgam of those rationales: Congress may not "prescribe[] a rule of decision in a case pending before the courts, and [do] so in a manner that required the courts to decide a controversy in the Government's favor," and Congress may not "impair[] the effect of a pardon, and thus infring[e] the constitutional power of the Executive." *United States* v. *Sioux Nation*, 448 U.S. 371, 404-405 (1980) (citation omitted); accord *Austin* v. *United States*, 155 U.S. 417, 424-425 (1894).

c. The courts of appeals' disparate treatment of *Klein* reflects the mixed signals this Court has sent. The Third Circuit has read *Klein* as suggesting that Congress may not interfere with a court's ability to adjudicate a pending case. *Temple University* v. *United States*, 769 F.2d 126, 134 n.4 (3d Cir. 1985), cert. denied, 476 U.S. 1182 (1986). Other circuits have construed *Klein* as standing for the propositions that Congress may not enact a rule of decision for a particular case, see, *e.g.*, *Demartino* v. *Commissioner*, 862 F.2d 400, 408 (2d Cir. 1988), and that Congress may not attack a final judgment with new legislation, see, *e.g.*, *Barcellos & Wolfsen* v. *Westlands Water Dist.*, 899 F.2d 814, 830 (9th Cir.), cert. denied, 111 S. Ct. 555 (1990). The D.C. Circuit has treated *Klein* as limiting Congress's authority to prescribe federal court jurisdiction. *Bartlett* v. *Bowen*, 816 F.2d 695 (D.C. Cir. 1987); but see *National Juvenile Law Center, Inc.* v. *Regnery*, 738 F.2d 455, 465 (D.C. Cir. 1984) (per curiam) (noting divergent views of *Klein*, but declining to "decide what the proper scope of the *Klein* holding is").

Other circuits have adopted further variations of *Klein*. Following a suggestion made by commentators, the Fourth Circuit has construed *Klein* as prohibiting Congress from enacting legislation that

> dictate[s] "how the Court should decide an issue of fact (under threat of loss of jurisdiction)" and purports to "bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds."

United States v. *Brainer*, 691 F.2d 691, 695 (4th Cir. 1982) (quoting P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 316 n.4 (2d ed. 1973)); see

Memorial Hosp. v. *Heckler*, 706 F.2d 1130, 1137 (11th Cir. 1983).[23]

The Ninth Circuit, as the decision below exemplifies, treats *Klein* differently. In that court's view, *Klein* holds that Congress may not *either* "direct[] the court to reach a specific result and make certain factual findings under existing law in connection with * * * cases pending in federal court," App., *infra*, 14a, *or* "require[] [the court] to apply an unconstitutional law," *Grimesy* v. *Huff*, 876 F.2d 738, 744 (9th Cir. 1989) (citation omitted). See App., *infra*, 12a-13a; *Stop H-3 Ass'n* v. *Dole*, 870 F.2d 1419, 1437 n.26 (9th Cir. 1989); *Konizeski* v. *Livermore Labs (In re Consolidated United States Atmospheric Testing Litigation)*, 820 F.2d 982, 992 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988); see also P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 369 n.4 (3d ed. 1988).

d. In this case, the Ninth Circuit has mistakenly construed *Klein* as prohibiting Congress from enacting changes in substantive law to function as rules of decision in pending federal court actions. As one court of appeals has aptly noted:

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[23] The most recent edition of *Hart & Wechsler's The Federal Courts and The Federal System* retracts the earlier suggestion that *Klein* limits Congress's authority to govern the fact-finding process. P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 369-370 n.5 (3d ed. 1988). The editors point out that *Klein* contained no such holding "since the parties had in effect stipulated that, absent the pardon, the decedent's conduct required a finding of disloyalty." *Id.* at 370 n.5 (citing Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States *v.* Klein *Revisited*, 1981 Wis. L. Rev. 1189, 1233-1238).

> Pending cases are often affected by the actions of coordinate branches of government. * * * [T]he general rule is that, if Congress changes the law while a case is pending, the courts are obligated to apply the law as they find it at the time of judgment (including appellate judgment).

National Juvenile Law Center, Inc. v. *Regnery*, 738 F.2d at 465; see *Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974); *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801).

And, wholly apart from any controversy concerning the continuing validity of the rule of *Bradley* and *The Schooner Peggy*, see *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 110 S. Ct. 1570, 1576-1578 (1990); *id.* at 1579-1585 (Scalia, J., concurring); *id.* at 1591-1594 (White, J., dissenting), it is well settled that Congress may constitutionally specify that its enactments changing substantive law are to be applied retroactively. See *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 396 (1989); *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 728-731 (1984); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976). For that reason, it is apparent that "*Klein* could not possibly stand for the proposition that *any* attempt by [Congress] to affect pending cases is unconstitutional." *National Juvenile Law Center, Inc.* v. *Regnery*, 738 F.2d at 465.

In this case, Congress has acted well within its authority in enacting legislation regarding the management and disposition of public property. U.S. Const. Art. IV, § 3, Cl. 2; see *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 580 (1987); *Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976); *United States* v. *San Francisco*, 310 U.S.

16, 29 (1940). The decision below, rather than finding any independent constitutional infirmity with Section 318(b)(6)(A), effectively determined that the statute amounted to a congressionally mandated conclusive presumption. But a statutorily prescribed conclusive presumption is merely a particular form of enactment of a substantive rule. If the rule itself is constitutionally permissible—as is the case here—then the form of its enactment as a conclusive presumption is not proscribed by the Constitution, *Klein*, or any other decision of this Court. See *United States* v. *Locke*, 471 U.S. 84, 98-100 (1985); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 28; *Tot* v. *United States*, 319 U.S. 463, 467-468 (1943).

3. The substantial practical significance of the court of appeals' decision is not diminished by the statute's expiration at the close of fiscal year 1990. First, the court of appeals' striking down of Section 318(b)(6)(A) has enabled respondents to overturn twelve 1990 timber sales and paves the way for respondents' similar efforts regarding every other outstanding 1990 timber sales. See pp. 14-15, *supra*.

Second, the statute—despite its expiration—continues to affect an enormous quantity of timber. Section 318(k), 103 Stat. 750, provides that "[t]imber sales offered to meet the requirements of subsection (a) of this section shall be subject to the terms and conditions of this section for the duration of those sales contracts." In the *Seattle Audubon Society* litigation, the Forest Service estimates that approximately four billion board feet of timber sold under the terms of Section 318 during 1990 remain uncut; in the *Portland Audubon Society* litigation, the BLM estimates that approximately 1.1 billion board feet of timber fall within that category.

Finally, as the litigation unfolding on remand vividly shows, the Ninth Circuit has opend the door to

the very dilemma Congress sought to avoid when it enacted Section 318 as a legislative compromise—the prospect of a timber crisis in the Pacific Northwest, with attendant uncertainty, unemployment, and litigation-driven contractions to the timber supply. The real—and potentially devastating—consequences of the Ninth Circuit's ruling call for this Court's review now. As Senator Adams noted when Congress was considering passage of Section 318:

> Unfortunately, the severity of the crisis this year did not give us the luxury of time to slowly mull over this issue. Mills were shutting down. Jobs were threatened and gone. Our State was being torn apart, and tensions were rising with the very real potential of violence.

135 Cong. Rec. S12,961 (daily ed. Oct. 7, 1989). The same holds true today, since the Ninth Circuit has effectively turned back the clock.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MARTIN W. MATZEN
ANNE S. ALMY
Attorneys

APRIL 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 90-35020, 90-80008
D.C. No. CV-89-160WD

SEATTLE AUDUBON SOCIETY; PILCHUCK AUDUBON SOCIETY; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON NATIVE PLANTS SOCIETY; OREGON NATURAL RESOURCES DEFENSE COUNCIL, INC.; PORTLAND AUDUBON SOCIETY; LANE COUNTY AUDUBON SOCIETY; SIUSLAW TASK FORCE, PLAINTIFFS-APPELLANTS

v.

F. DALE ROBERTSON, in his official capacity as Chief, United States Forest Service; UNITED STATES FOREST SERVICE, an agency of the United States, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Western District of Washington
William L. Dwyer, District Judge, Presiding

No. 90-35120
D.C. No. 87-1160-FR

SEATTLE AUDUBON SOCIETY; PILCHUCK AUDUBON SOCIETY; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON NATIVE PLANTS SOCIETY; OREGON NATURAL RESOURCES DEFENSE COUNCIL, INC.; PORTLAND AUDUBON SOCIETY; LANE COUNTY AUDUBON SOCIETY; SIUSLAW TASK FORCE, PLAINTIFFS-APPELLANTS

v.

F. DALE ROBERTSON; UNITED STATES FOREST SERVICE, DEFENDANTS-APPELLEES

NORTHWEST FOREST RESOURCE COUNCIL; ASSOCIATION OF O & C COUNTIES, DEFENDANTS/INTERVENORS-APPELLEES

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge Presiding

ORDER AND AMENDED OPINION

Argued and Submitted
April 3, 1990—San Francisco, California

Filed September 18, 1990
Amended October 30, 1990

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Harry Pregerson,
Circuit Judges.

Opinion by Judge Pregerson

ORDER

The opinion filed on September 18, 1990 is amended as follows:

On slip opinion page 11794, the last sentence shall begin with "Subsection (b)(6)(A)" instead of "Section 318."

On slip opinion page 11798, in the last sentence of the first full paragraph, the reference to "section 318" shall be changed to "subsection (b)(6)(A)."

On slip opinion page 11798, in the second full paragraph, the first three sentences shall be replaced with the following:

> Section 318 does not, by its plain language, repeal or amend the environmental laws underlying this litigation, even though some subsections add additional requirements.[1] The clear effect of subsection (b)(6)(A) is to direct that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5), then the government will have done what is required under the environmental statutes involved in these cases.

On slip opinion page 11798, a new footnote ≟1 shall read:

> For example, subsection (b)(2) requires that fragmentation of ecologically significant old growth forest stands be minimized, and subsections (b)(3) and (b)(5) forbid timber sales in specified areas where spotted owls are found.

On slip opinion page 11799, the first line of the first full paragraph shall be replaced with:

> Subsection (b)(6)(A), at issue here, does not establish new law, but

In the first line of the second full paragraph on slip opinion page 11799, the reference to "section 318" shall be changed to "subsection (b)(6)(A)."

On slip opinion page 11801, the last sentence preceding the conclusion shall be changed to read:

> These principles preclude a saving interpretation of subsection (b)(6)(A).

On slip opinion page 11801, after the heading labeled "CONCLUSION," the opinion shall read:

> Although the legislative history of section 318 disguises the act as changing legal standards, the statutory language itself does not do so. The first sentence of subsection (b)(6)(A) violates the separation of powers doctrine.[4]
>
> The judgments of the district courts are REVERSED. The cases are remanded to the district courts for proceedings consistent with this opinion. This order shall act as and for the mandate in these cases and the pending motion to recall the mandate is denied.

Footnotes ⁼1 and ⁼2 shall be renumbered respectively as footnotes ⁼2 and ⁼3. In the last sentence of former footnote ⁼2, which shall now be the new footnote ⁼3, the reference to "section 318" shall be changed to "subsection (b)(6)(A)."

A new footnote ⁼4 should be added at the end of the first paragraph under the heading labeled "CONCLUSION" as follows:

> We express no opinion on the validity of the second and final sentence of subsection (b)(6)(A).

OPINION

PREGERSON, Circuit Judge:

These consolidated appeals arise out of the ongoing controversy over logging in old growth forests in Oregon and Washington and the impact of that logging on the northern spotted owl. In response to ongoing legal disputes, Congress enacted section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, 103 Stat. 701, 745-50 (1989) ("section 318"). Section 318 would allow timber sales in old growth forests in Oregon and Washington in fiscal year 1990. The issue before us is whether section 318 violates the separation of powers doctrine by directing the judiciary to reach a particular result in the two cases underlying this appeal.

BACKGROUND

In October 1987, the Portland Audubon Society ("Portland Audubon") and other environmental organizations filed an action in district court for declaratory and injunctive relief, challenging forest management activities of the Bureau of Land Management, U.S. Department of the Interior ("BLM"), as violating the National Environmental Protection Act ("NEPA"), 42 U.S.C. §§ 4321-4347, the Oregon & California Lands Act, 43 U.S.C. § 1181, the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784, and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-718. The district court dismissed the action, and we reversed. *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, —— U.S. ——, 109 S. Ct. 3229 (1989). On remand, the district court again dismissed the action. *Portland Audubon Soc'y*

v. Lujan, 712 F. Supp. 1456 (D. Ore. 1989). We affirmed the dismissal of the NEPA claim, but reversed the dismissal of the non-NEPA claims. *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S. Ct. 1470 (1990). On October 23, 1989, Portland Audubon renewed its motion in the district court for summary judgment under the Oregon and California Lands Act, the Federal Land Policy and Management Act, and the Migratory Bird Treaty Act.

On February 8, 1989, the Seattle Audubon Society and other environmental organizations ("Seattle Audubon") filed a complaint in district court for declaratory and injunctive relief, challenging the United States Forest Service's ("Forest Service") administrative decision adopting certain timber management guidelines as affording inadequate protection to the northern spotted owl. A month later, the Washington Contract Loggers Association also filed suit, challenging the guidelines as overly restricting timber harvesting. Seattle Audubon and the Washington Contract Loggers Association moved for preliminary injunctions. The district court initially denied both motions, but later granted Seattle Audubon's renewed motion for a preliminary injunction and enjoined certain planned timber sales.

Meanwhile, Congress passed section 318, which went into effect October 23, 1989. The "Northwest Timber Compromise," inter alia, requires the Forest Service and BLM to sell in fiscal year 1990 7.7 billion board feet of timber, of which 5.8 billion is to come from Oregon and Washington. § 318(a)(1). Section (b)(3) sets out a timber management plan for national forest lands in Oregon and Washington. Under this section, no sales are to come from Spotted Owl

Habitat Areas identified in the Environmental Impact Statement and Record of Decision of 1988, prepared in relation to proposed timber sales on Forest Service land. Section (b)(3) also adds about 2,300 acres to the protected forest areas in the affected national forests. § 318(b)(3). Section (b)(5) sets out a timber management plan for certain BLM lands in Oregon. Under this section, no sales are to come from areas identified as Spotted Owl Habitat Areas in an agreement between BLM and the Oregon Department of Fish and Wildlife, dated December 22, 1987. Section (b)(5) also directs BLM to identify an additional 12 protected areas on affected BLM land. § 318 (b)(5).

At the heart of these appeals is section 318 (b)(6)(A), which specifically refers to the two cases now before us and provides:

> Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 12, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for

> the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

On November 6, 1989, based on section 318 the district court in *Seattle Audubon* vacated the preliminary injunction. The district court rejected Seattle Audubon's argument that section 318(b)(6)(A) violates the separation of powers doctrine and is therefore unconstitutional. The district court retained jurisdiction over the case and certified for interlocutory appeal under 28 U.S.C. § 1292(b) its decision to vacate the preliminary injunction. On December 21, 1989, the district court in *Portland Audubon* granted the government's motion to dismiss, based on section 318, over Portland Audubon's constitutional challenge to section 318(b)(6)(A).

Portland Audubon and Seattle Audubon filed timely notices of appeal. We have jurisdiction over Seattle Audubon's interlocutory appeal in *Seattle Audubon* under 28 U.S.C. § 1292(b) and over the district court's final order in *Portland Audubon* under 28 U.S.C. § 1291.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law. We therefore review the district courts' rulings de novo. *Trerice v. Pederson*, 769 F.2d 1398, 1400 (9th Cir. 1985).

DISCUSSION

The Supreme Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, —— U.S. ——, 109 S. Ct. 647, 658 (1989). In this case we must decide whether, in enacting section 318, Congress went beyond the limits of its power established in the Constitution.

By section 318, Congress for the first time endeavors to instruct federal courts to reach a particular result in pending cases identified by caption and file number. Subsection (b)(6)(A) raises serious constitutional concerns in light of Article III's stated premise that the judicial power of the United States, encompassing cases and controversies, lies in the federal courts and not in Congress.

In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), the Supreme Court struck down an act of Congress because it violated the separation of powers doctrine. The plaintiff in *Klein*, the administrator of the deceased owner of property sold by federal agents during the Civil War, sued for proceeds of that sale under a law that gave a cause of action to recover such proceeds to noncombatant confederate landowners upon proof of loyalty to the federal government. The Supreme Court, in an earlier case, decided that receipt of a Presidential pardon was sufficient proof of "loyalty" under this law. Because the deceased landowner in *Klein* had received a pardon, the court of claims awarded recovery. Pending the government's appeal from the court of claims' decision, Congress passed a statute providing that no pardon was ad-

missible as proof of loyalty to the federal government and that acceptance of a pardon, under most circumstances, was conclusive evidence of disloyalty. The statute directed the Supreme Court and the court of claims to find that a claimant who accepted a Presidential pardon without disclaiming previous disloyalty was in fact disloyal and, therefore, not entitled to land sale proceeds under the law which allowed a noncombatant confederate claimant to receive those proceeds upon proof of loyalty. The newly enacted statute further directed the Supreme Court to dismiss any case in which a claimant had prevailed in the court of claims if the claimant prevailed upon proof of loyalty by Presidential pardon.

The Court explained that the effect of the statute was to deny jurisdiction to the Supreme Court and court of claims "solely on the application of a rule of decision, in causes pending prescribed by Congress." *Id.* at 146. This, the Court held, Congress could not do: "It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power." *Id.* Because Congress had "prescribe[d] a rule for the decision of a cause in a particular way," Congress "passed the limit which separates the legislative from the judicial power," and the provision was declared unconstitutional. *Id.* at 146-47.

Significantly, the Court in *Klein* distinguished an earlier, similar case, *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855). There, the Court had originally held that a bridge was an obstruction. Intervening legislation, however, made the bridge a post-road for passage of the United States mail and required that navigation not interfere with the bridge. The Court concluded in

Wheeling Bridge that this new statute *changed* the previous law. "[A]lthough [the bridge] still may be an obstruction in fact, [it] is not so in the contemplation of law." *Id.* at 430. The court, therefore, decided the case on the theory that Congress had changed the law, not that Congress had told the court that it should decide the case differently under the same law. As such, *Wheeling Bridge* differed from *Klein* in a critically important aspect: "No arbitrary rule of decision was prescribed in [*Wheeling Bridge*], but the court was left to apply its ordinary rules to the new circumstances created by the act. In [*Klein*], no new circumstances, ha[d] been created by legislation." *Klein*, 80 U.S. at 146-47.

Congress exists to write and change our laws, and the courts are bound to apply the law extant at the time of decision. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). We read *Klein* and *Wheeling Bridge*, however, as delineating limits of congressional power to control litigation through legislation. Congress can *amend or repeal* any law, even for the purpose of ending pending litigation. *Wheeling Bridge*, 59 U.S. at 421; *see also State of Ark. v. Goldschmidt*, 627 F.2d 839, 842 (9th Cir. 1980) (appeal rendered moot by legislation). But Congress cannot "prescribe a rule for a decision of a cause in a certain way" where "no new circumstances have been created by legislation." *Klein*, 80 U.S. at 147.

More recent Supreme Court authority also strongly suggests that the critical distinction, for purposes of deciding the limits to Congress' authority to affect pending litigation through statute, is between the actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case, without repeal-

ing or amending the law underlying the litigation, which is not permissible. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 (1980) (reason the statute at issue in *Klein* was unconstitutional was that "it prescribed a rule of decision in a case pending before the courts").

Though the precise contours are difficult to discern, we have recognized the limits the Constitution puts on congressional power to control federal courts' jurisdiction. In *Konizeski v. Livermore Labs (In re Consolidated United States Atmospheric Testing Litigation)*, 820 F.2d 982, 992 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988), we noted that "[c]ongressional attempts to alter the rule of decision in pending cases in favor of the government have been condemned as a violation of Article III." But despite this broad language, *Atmospheric Testing* interpreted *Klein* restrictively: "'Congress violates the separation of powers when it presumes to dictate 'how the Court should decide an issue of fact (under threat of loss of jurisdiction)' *and* purports to 'bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds.'" *Atmospheric Testing*, 820 F.2d at 992 (emphasis added) (quoting *United States v. Brainer*, 691 F.2d 691, 695 (4th Cir. 1982) (quoting P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, *Hart & Wechsler's The Federal Courts and The Federal System*, 316 n.4 (2d ed. 1973))).

In a case decided last year, *Grimsey v. Huff*, 876 F.2d 738 (9th Cir. 1989), we clarified this restrictive language by making the *Atmospheric Testing* holding disjunctive rather than conjunctive. 876 F.2d at 744.

This interpretation is consistent with the language of the Supreme Court's decision in *Klein* and with subsequent Court authority on the separation of pow-

ers doctrine. *See United States v. Sioux Nation of Indians*, 448 U.S. at 404-05. We thus conclude that Ninth Circuit law does not require *both* a finding that Congress has impermissibly directed certain findings in pending litigation, without changing any underlying law, *and* that a challenged statute be independently unconstitutional on other grounds. Reading *Klein* in the conjunctive would require that Congress' action be unconstitutional on two grounds—an illogical requirement.

The issue before us, then, is whether section 318 is a permissible modification of the law underlying the two cases before us, as the district courts held, or an impermissible directive from Congress to the courts to decide the cases in a particular way. We conclude that subsection (b)(6)(A) runs afoul of the separation of powers doctrine.

Section 318 does not, by its plain language, repeal or amend the environmental laws underlying this litigation, even though some subsections add additional requirements.[1] The clear effect of subsection (b)(6)(A) is to direct that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5), then the government will have done what is required under the environmental statutes involved in these cases. Thus, if the Secretary does follow subsections (b)(3) and (b)(5) by observing their limitations on owl habitat, then the Secretary will be deemed in fact to have met as well the requirements of several environmental statutes.

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[1] For example, subsection (b)(2) requires that fragmentation of ecologically significant old growth forest stands be minimized, and subsections (b)(3) and (b)(5) forbid timber sales in specified areas where spotted owls are found.

In this way Congress, through section 318, seeks to perform functions reserved to the courts by Article III of the Constitution. For example, if the Secretary follows subsections (b)(3) and (b)(5), then the Secretary will be found to have used the "principles of multiple use and sustained yield" and the "systematic interdisciplinary approach" mandated by the Federal Land Policy and Management Act, 43 U.S.C. § 1712(c)(1) and (2). In addition, the agency will be deemed to have included detailed statements of adverse environmental effects and alternatives required under NEPA, 42 U.S.C. § 4332. Also, there will have been no taking of habitat as proscribed under the Migratory Bird Treaty Act, 16 U.S.C. § 703.

Subsection (b)(6)(A), at issue here, does not establish new law, but directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court. This is what *Klein* and subsequent cases agree is constitutionally proscribed. *See Grimesy v. Huff*, 876 F.2d at 738 (no constitutional violation because "the statute in question neither direct[ed] the court to make a certain finding of fact nor requir[ed] [the court] to apply an unconstitutional law" (quoting *Atmospheric Testing*, 820 F.2d at 992)); *see also United States v. Sioux Nation of Indians*, 448 U.S. at 404-05.

It is this key aspect that distinguishes subsection (b)(6)(A) from the statutory provisions we upheld in *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419 (9th Cir. 1989). In that case, an appropriations bill provision directed the Secretary of Transportation to build a highway—the subject of prolonged litigation under various environmental protection statutes—"notwithstanding" those environmental statutes' require-

ments. The statute challenged in *Stop H-3* simply ordered construction of the highway and specifically, as a matter of permanent law, *withdrew* the statutory environmental protection provisions underlying the ongoing litigation as to the challenged project by exempting the project from the provisions' requirements. *Id.* at 1437.[2] The provision at issue in *Stop H-3* did *not* leave the underlying statute intact (as to the H-3 project), order a course of government atcion, and then direct a court finding that the environmental statutes' requirements were satisfied by the government action ordered. That is what Congress did when it enacted section 318, at issue in the present case.

We must uphold a statute if "it is fairly possible to interpret the [challenged] statute in a manner that renders it constitutionally valid." *Communication Workers of Am. v. Beck*, —— U.S. ——, 108 S. Ct. 2641, 2657 (1988). That Congress could possibly have written a valid statute, however, does not mean that we can "fairly" interpret the statute that Con-

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[2] Section 114 of the Continuing Appropriations Bill for Fiscal Year 1987, Pub. L. No. 99-500, 100 Stat. 1783 (later reenacted as Pub. L. No. 99-591, 100 Stat. 3341) stated in relevant part:

> (a) The Secretary of Transportation shall approve the construction of Interstate Highway H-3 between the Halawa interchange to, and including the Halekou interchange (a distance of approximately 10.7 miles), and such construction shall proceed to completion *notwithstanding section 23 and section 303 of title 49, United States Code.*

(Emphasis added.) Sections 138 and 303, the so-called "4(f)" provisions, require the Secretary of Transportation, before building a highway through certain ecologically important areas, to take various steps in order to protect the environment.

gress in fact enacted as constitutionally valid. The language of section 318 is clear: Congress not only legislated a forest management plan, §§ 318(b)(3), (b)(5), but also directed the courts to find that that plan satisfied the environmental laws underlying the ongoing litigation. § 318(b)(6)(A). In doing so, Congress did not amend or repeal laws, as it unquestionably could do, but rather prescribed a rule for the decision of a cause in a particular way, without changing the underlying laws, as it unquestionably cannot do.[3]

We note further that, even if we could interpret section 318 as a temporary repeal of the environmental laws at issue in the underlying litigation, then section 318 would amount to an implied partial repeal of the environmental statutes. That is what we held in *Portland Audubon Soc'y v. Hodel*, 866 F.2d at 307, Congress could not do in an appropriations measure. In so holding, we followed the Supreme Court in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). These principles preclude a saving interpretation of subsection (b)(6)(A).

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[3] We are not persuaded that the legislative history of section 318 requires a different conclusion. The House report accompanying the measure does state that section 318(b)(6)(A) "does not pass on the legal sufficiency of the existing Forest Service [Record of Decision] or the [Bureau of Land Management/Oregon Department of Fish and Wildlife] agreement insofar as each addresses concerns about the northern spotted owl." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 88-89 (1987). The same report, however, states that section 318 "in no way alters application of the Endangered Species Act or other environmental laws to Forest Service and BLM management activities." *Id.* at 89. We decline to read these mixed signals to change the plain meaning and effect of subsection (b)(6)(A).

CONCLUSION

Although the legislative history of section 318 disguises the act as changing legal standards, the statutory language itself does not do so. The first sentence of subsection (b)(6)(A) violates the separation of powers doctrine.[4]

The judgments of the district courts are REVERSED. The cases are remanded to the district courts for proceedings consistent with this opinion. This order shall act as and for the mandate in these cases and the pending motion to recall the mandate is denied.

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[4] We express no opinion on the validity of the second and final sentence of subsection (b)(6)(A).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 90-35020, 90-80008

SEATTLE AUDUBON SOCIETY; PILCHUCK AUDUBON SOCIETY; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON NATIVE PLANTS SOCIETY; OREGON NATURAL RESOURCES DEFENSE COUNCIL, INC.; PORTLAND AUDUBON SOCIETY; LANE COUNTY AUDUBON SOCIETY; SIUSLAW TASK FORCE, PLAINTIFFS-APPELLANTS

v.

F. DALE ROBERTSON, in his official capacity as Chief, United States Forest Service; UNITED STATES FOREST SERVICE, an agency of the United States, DEFENDANTS-APPELLEES

No. 90-35120

SEATTLE AUDUBON SOCIETY; PILCHUCK AUDUBON SOCIETY; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON NATIVE PLANTS SOCIETY; OREGON NATURAL RESOURCES DEFENSE COUNCIL, INC.; PORTLAND AUDUBON SOCIETY; LANE COUNTY AUDUBON SOCIETY; SIUSLAW TASK FORCE, PLAINTIFFS-APPELLANTS

v.

F. DALE ROBERTSON; UNITED STATES FOREST SERVICE, DEFENDANTS-APPELLEES

NORTHWEST FOREST RESOURCE COUNCIL; ASSOCIATION OF O & C COUNTIES, DEFENDANTS INTERVENORS-APPELLEES

ORDER

[Filed Jan. 16, 1991]

Before: GOODWIN, SCHROEDER, and PREGERSON, Circuit Judges

The panel as constituted above voted to deny the petitions for rehearing by Northwest Forest Resource Council and Washington Contract Loggers' Association and to reject the suggestion for rehearing en banc. The panel also voted to deny the motion for recall of the mandate by the federal appellees and to reject their suggestion for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The motion for recall of the mandate and the petitions for rehearing are denied. The suggestions for rehearing en banc are rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-160WD

SEATTLE AUDUBON SOCIETY, ET AL., PLAINTIFFS

v.

F. DALE ROBERTSON, ET AL., DEFENDANTS

No. C89-99(T)WD

WASHINGTON CONTRACT LOGGERS ASSOCIATION, ET AL., PLAINTIFFS

v.

F. DALE ROBERTSON, ET AL., DEFENDANTS

[Filed Nov. 14, 1989]

MEMORANDUM DECISION RE
CONSTITUTIONALITY AND RETENTION
OF JURISDICTION

I. INTRODUCTION

This memorandum decision supplements the order entered on November 6, 1989, holding section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, 103 Stat. 701, 745-50 (1989) ("section 318"), to be constitutional. Section 318 became law on October 23, 1989. The net result of the legislation, after a prolonged battle in Congress, is to set aside, for one year, certain requirements of the environmental laws so that logging may go forward in old-growth national forest areas that contain spotted owl habitat. The November 6 order was issued in brief form because of the need for a prompt ruling. Today's order gives further reasons for the constitutionality holding, and rules that the court will retain jurisdiction rather than dismissing these cases.

A summary of the earlier proceedings in these cases is given in the November 6 order at pages 2-5.

II. CONSTITUTIONALITY

The policy issues debated by Congress, and resolved for the moment (but no longer) by section 318, are so important and volatile that a few words must be said about the role of the courts.

The United States Constitution is grounded on a careful separation of powers among the three branches of government. The Supreme Court has said: "This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, —— U.S. ——, 109 S. Ct. 647, 658, 102 L. Ed. 2d 714 (1989). Congress legis-

lates, the executive branch carries out the laws and proposes new ones, and the courts apply the laws to the cases that come before them.

If our system is to work, each branch of government must faithfully respect the constitutional limits of its powers. *INS v. Chadha*, 462 U.S. 919, 951, 103 S. Ct. 2764, 2784, 77 L. Ed. 2d 317 (1983) (separation of powers designed "to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility").

In managing the federally-owned public lands, it is Congress, not the courts, that must make the policy decisions. *Kleppe v. New Mexico*, 426 U.S. 529, 536, 96 S. Ct. 2285, 2290, 49 L. Ed. 2d 34 (1976) ("the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there"); *see also Miller v. Youakim*, 440 U.S. 125, 142 n.21, 99 S. Ct. 957, 967 n.21, 59 L. Ed. 2d 194 (1979) ("issue[s] of legislative policy . . . [are] better addressed to the wisdom of Congress than to the judgments of this Court") (internal quotation marks omitted). A judge might feel that the opponents of section 318 are right in arguing that it will sacrifice a priceless and irreplaceable part of the wilderness while doing nothing to solve the chronic timber supply problem of local mills. Or he might feel that others are right in arguing that jobs will be saved and that enough old growth is already protected in parks and wilderness areas. He might think the country would be well advised to leave the policy decision to him. But the country and the Constitution have not done that. The role of the courts is and must be limited to deciding whether the law passed by Congress and signed by the President is constitutional. If it is, it must be upheld

whether it is wise or foolish. Courts must not strike down laws as unconstitutional merely because they disagree with them. *Chadha*, 462 U.S. at 944, 103 S. Ct. at 2780; *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2517, 49 L. Ed. 2d 511 (1976).

In the present cases the plaintiffs Seattle Audubon Society, et al. ("SAS"), have challenged the constitutionality of subsection (b)(6)(A) of section 318. This is the only part of section 318 challenges of any party. However, it should be read in context. A copy of section 318 is attached as Exhibit A to the order of November 6, 1989. A copy of the Congressional conference report, H.R. Conf. Rep. No. 2788, 101st Cong., 1st Sess. 86 (1989) [hereinafter Conference Report], is attached as Exhibit B to that order.

SAS raises two issues regarding subsection (b)(6)(A): Whether Congress was impermissibly directing the result in a pending case, and whether the bar to federal judicial review of the one-year guidelines adopted by the statute is constitutional.

The separation of powers doctrine bars Congress from directing a particular decision in a pending case. *See United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 20 L. Ed. 519 (1871); *see also United States v. Sioux Nation of Indians*, 448 U.S. 371, 404, 100 S. Ct. 2716, 2735, 65 L. Ed. 2d 844 (1980) (citing *Klein*): *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 992 (9th Cir. Cir. 1987) ("*Atmospheric Testing*") (same), *cert. denied*, —— U.S. ——, 108 S. Ct. 1076 (1988); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45, 47 n.6 (1975).

However, subsection (b)(6)(A) does not require a particular decision on the issues of this case. Instead, it provides that for fiscal year 1990 the new standards adopted by Congress in subsections (b)(3) and (b)(5) will apply, and will be adequate for that year. In other words, Congress has adopted the Forest Service's proposed guidelines, challenged by both sets of plaintiffs in these cases, as statutory law for a period of one year. Congress clearly has the power to do this. In *Stop H-3 Association v. Dole*, 870 F.2d 1419, 1430 (9th Cir. 1989), plaintiffs sued to enjoin construction of a highway they contended would be damaging to the environment. While the case was pending, Congress enacted legislation "carving out a local exception to a national [environmental] policy" to allow the highway to be built. *Id.* The Ninth Circuit held that Congress has the power to make exceptions to rights it or state legislatures have created by statute. *Id.*

Just as Congress may create a geographic exception to the environmental laws, it may also create a temporal exception. It has done that here. Subsections (b)(3) and (b)(5), adopting the standards which subsection (b)(6)(A) deems adequate, apply only to that year. *See* Conference Report, *supra*, at 87 ("These measures included in this provision have been provided on an interim basis for fiscal year 1990 only . . . .").

Congress has expressly said that it was not "passing on the legal and factual adequacy of the [FSEIS] and the accompanying [ROD]." § 318(b)(6)(A), 103 Stat. at 47; *see also* Conference Report, *supra*, at 88-89 ("Section (b)(6)(A) does not pass on the legal sufficiency of the existing Forest Service ROD . . . insofar as [it] addresses concerns about the northern spotted owl.").

The court is to construe federal statutes "so as to avoid serious doubts as to their constitutionality, and when faced with such doubts the [c]ourt will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Communications Workers of America v. Beck*, —— U.S. ——, 108 S. Ct. 2641, 2657, 101 L. Ed. 2d 634 (1988). Section 318 can and must be read as a temporary modification of the environmental laws. As such it is well within Congress's constitutional power.

The remaining question raised by SAS has to do with the last sentence of subsection (b)(6)(A), which provides that the guidelines temporarily adopted by subsections (b)(3) and (b)(5) "shall not be subject to judicial review by any court of the United States." The federal courts other than the Supreme Court have been created by Congress and, in general, Congress may restrict their jurisdiction. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449, 12 L. Ed. 1147 (1850); *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 551, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962); *Antolok v. United States*, 873 F.2d 369, 374 (9th Cir. 1989). The extent of Congress's power to do that does not need to be discussed here. Subsection (b)(3) provides, after setting forth certain acreage requirements for spotted owl habitat: "All other standards and guidelines contained in the Chief's Record of Decisions are adopted." That provision turns those standards and guidelines into temporary statutory law. The provision in subsection (b)(6)(A) that the adopted guidelines "shall not be subject to judicial review" means only that, as new statutory law, the guidelines cannot be tested in court for compliance with the National Forest Management

Act, the National Environmental Policy Act, or other general environmental statutes.

SAS relies on three cases in contending that subsection (b)(6)(A) is unconstitutional. The Supreme Court's holding in *United States v. Klein*, 80 U.S. (13 Wall.) 128, 20 L. Ed. 519 (1871), does not apply to a statute—such as section 318—that "neither directs the court[s] to make a certain finding of fact nor requires them to apply an unconstitutional law, [and therefore does not offend] the separation of powers doctrine." *See Atmospheric Testing*, 820 F.2d at 992 (quoting *United States v. Brainer*, 691 F.2d 691, 695 (4th Cir. 1982) (internal quotation marks omitted)). Neither of the other two cited cases ruled on the questions at issue here. In *Cerro Metal Products v. Marshall*, 467 F. Supp. 869 (E.D. Pa. 1979), *aff'd*, 620 F.2d 964 (3d Cir. 1980), the trial court held that an agency rule promulgated during a pending case did not bind the court. In *Personal Finance Co. v. United States*, 86 F. Supp. 779 (D. Del. 1949), the issue was whether a staute should be given retroactive effect.

As stated in the November 6 order:

> Congress has the power to modify the application of these [environmental] statutes in the management of public lands, and in section 318 it has exercised that power by adopting temporary standards and exemptions in regard to national forests in Washington and Oregon.

Order Determining Section 318(b)(6)(A) of Act to be Constitutional, etc., at 6 (Nov. 6, 1989).

For the reasons stated, subsection (b)(6)(A) is constitutional. No other part of section 318 has been challenged. It should be noted that no party has argued that the statute would prevent judicial re-

view of administrative action challenged under the Constitution or for alleged noncompliance with section 318 itself.

III. RETENTION OF JURISDICTION

The final question is whether the court should dismiss these cases or retain jurisdiction. Congress can enact legislation that moots a pending case. *See, e.g., Bowen v. Kizer*, 485 U.S. 386, 108 S. Ct. 1200, 99 L. Ed. 2d 402 (1988). Where a congressional action "cuts the basis from under [a] controversy" and makes it "purely academic," the case is moot and should be dismissed. *Arkansas v. Goldschmidt*, 627 F.2d 839, 842 (8th Cir. 1980). Congress has not done that here. To the contrary, it has plainly stated that it did not mean to decide these cases, or to suggest what their final outcome should be. Conference Report, *supra*, at 89 ("Nothing in [section 318] is intended to prejudge any . . . final decisions that may be reached by a Federal court in the *Seattle* Audubon/Washington Contract Loggers Assoc. v. *Robertson* cases . . . ."); *see also* § 318(b)(6)(A), 103 Stat. at 47; Conference Report, *supra*, at 88. It has referred to proceedings in the cases that will come after adoption of the statute and after reconsideration of the ROD over the next year. *Id.* at 88-89. Section 318 alters the rules of the controversy for the next year, but it does not end the controversy. *Cf. Baxley v. Rutland*, 409 F. Supp. 1249 (M.D. Ala. 1976). The texts of the statutes and the conference report show that Congress expected these cases to go forward.

Whether or not the ROD is amended as a result of the process mandated by section 318, its legality under the environmental laws will still have to be

decided. In the meantime, section 318 permits judicial review of proposed timber sales in the affected areas on an expedited basis. § 318(g). Given the short timetable mandated by Congress, it is important that the parties be able to proceed by motion in these cases rather than having to start a new lawsuit.

For these reasons the cases will not be dismissed and the court will retain jurisdiction. A general stay of proceedings is not necessary or desirable. However, further discovery will be taken only by leave of court.

The clerk is directed to send copies of this order to all counsel of record.

Dated: November 14, 1989.

/s/ William L. Dwyer
WILLIAM L. DWYER
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-160WD

SEATTLE AUDUBON SOCIETY, ET AL., PLAINTIFFS

v.

F. DALE ROBERTSON, ET AL., DEFENDANTS

No. C89-99(T)WD

WASHINGTON CONTRACT LOGGERS ASSOCIATION, ET AL., PLAINTIFFS

v.

F. DALE ROBERTSON, ET AL., DEFENDANTS

[Filed Nov. 6, 1989]

ORDER DETERMINING SECTION 318(b)(6)(A) OF ACT TO BE CONSTITUTIONAL, VACATING PRELIMINARY INJUNCTION, AND VACATING HEARING DATE

On October 23, 1989, the President signed into law section 318 of the Department of Interior and Related Agencies Appropriations Act for fiscal year 1990, Pub. L. No. 101-121 ("section 318"). The court had asked all parties in these cases to file briefs on the impact of that bill, if adopted, on this litigation. The last briefs were filed on November 2, 1989. Also on November 2, briefing was completed on a motion of the plaintiffs in No. C89-99 to vacate the November 13 final hearing date.

Four basic questions are raised by the parties' briefs:

1. Is subsection (b)(6)(A) of section 318 constitutional?
2. Should the preliminary injunction be vacated?
3. Should the November 13 final hearing date be vacated?
4. Should these cases be dismissed as moot or, if not, should all proceedings in them be stayed?

A brief resume of these cases is necessary. Seattle Audubon Society, et al. ("SAS"), and Washington Contract Loggers Association, et al. ("WCLA"), both brought suit earlier this year against F. Dale Robertson, et al. (the "Forest Service"), challenging the legality of an administrative decision of the Forest Service adopting standards and guidelines for managing northern spotted owl habitat in the national forests of Washington and Oregon, the administrative decision is set out in a Record of Decision ("ROD"). For opposite reasons, the two sets of plaintiffs challenged the Forest Service's plan under the National Forest Management Act ("NFMA") and the National Environmental Policy Act ("NEPA") and their implementing regulations. SAS also relied on the Migratory Birds Treaty Act ("MBTA") and its implementing regulations.

The court consolidated the two cases, ordered them expedited, and set a final hearing date of June 13, 1989, after obtaining the parties' views on the time they needed to complete their prehearing work.

Both sets of plaintiffs sought preliminary injunctive relief before the final hearing. The WCLA motion was denied. The SAS motion as originally framed was denied as being overbroad; however, the order that was entered preserved the right of all parties to seek preliminary relief as to site-specific timber sales. A revised motion for preliminary relief by SAS, listing specific timber sales, was granted by order of March 24, 1989. The court found at that time that "the balance of irreparable harm tips sharply in favor of preserving the status quo between now and the final hearing set for June 13, 1989." As later amended, the preliminary injunction deferred 163 timber sales in Washington and Oregon for what then appeared to be a few weeks until the final hearing was held.

On May 11, 1989, the Forest Service moved for a stay of all proceedings in these cases pending completion of a conference process between the Forest Service and the Fish and Wildlife Service ("FWS"). The latter agency had announced on April 25, 1989, its decision—reversing an earlier decision—to list the northern spotted owl as "threatened" under the Endangered Species Act. The Forest Service argued that the inter-agency conference process required by law could have "varied and profound effects" on the ROD—in other words, that the court could end up reviewing a much different administrative decision than the one challenged by the plaintiffs. Memorandum in Support of Defendants' Motion for Stay at 2 (May 11, 1989). SAS and WCLA agreed that a stay was warranted.

In seeking a stay the Forest Service proposed a temporay ban on timber sales containing forty or more acres of spotted owl habitat. It stated that "the Forest Service will not offer timber sales containing forty or more acres of suitable spotted owl habitats prior to returning to this Court." *Id.* at 3.

On May 26, 1989, the court granted the requested stay of proceedings, kept the preliminary injunction in effect until further order, and, as proposed by the Forest Service, directed that during the stay the agency would not offer timber sales containing forty or more acres of suitable spotted owl habitat. The right of all parties to seek modifications of the stay order was preserved.

In applying for the stay the Forest Service said that it hoped to present within thirty days interim measures to protect spotted owl habitat during the pendency of the FWS listing process. Declaration of James C. Overbay at 3-4 (May 11, 1989). However, no such measures were announced within thirty days or afterward.

On August 24, 1989, the Forest Service moved for leave to go forward with eleven timber sales that were covered by the preliminary injunction. It relied upon letters written by the FWS to supervisors of four national forests. At this time there was no spotted owl management plan in effect. The Forest Service advised that the inter-agency conference process was going to take longer than first expected, and that "an inter-agency spotted owl conservation plan is being developed and is due for submission to agency leaders within six months." Defendants' Reply to SAS' Memorandum, etc., at 3 (Sept. 7, 1989). Thus, what had appeared to be a short delay when the Forest Service first requested it now appeared to be a delay of many months.

The court asked for the parties' views on whether the stay should be lifted. The Forest Service argued that the stay and preliminary injunction should remain in effect. SAS responded that the stay should be lifted. WCLA took no position.

The court lifted the stay and ordered that an expedited final hearing be rescheduled. This order, entered September 12, 1989, also consolidated with the final hearing the Forest Service's motion regarding the eleven timber sales.

After hearing from the parties on the time they needed to get ready, the court on September 28 entered an Order Scheduling Final Hearing and Remaining Pre-Hearing Steps. The final hearing was set for November 13, 1989.

A fuller history of the case is set out in the Order Lifting Stay, etc., entered September 12, 1989.

Congress in the meantime was debating legislation which would provide a short-term supply of national forest timber to mills in Washington and Oregon without having the usual type of agency action subject to judicial review. The final result was section 318, which became law on October 23, 1989. A copy of section 318 is attached as Exhibit A to this order. A copy of the relevant parts of the conference report is attached as Exhibit B. The parties' briefs on the impact of this legislation on the present cases have been fully considered, and the court now finds and rules as follows:

1. Subsection (b)(6)(A) of section 318 is constitutional. Whether the enactment is wise or not is for Congress, not the courts, to determine. A memorandum decision in regard to constitutionality will follow.

2. The preliminary injunction as originally issued, and as later extended at the Forest Service's re-

quest, was based upon acts of Congress, especially the National Forest Management Act, 16 U.S.C. § 1000 *et seq.*, the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and the Administrative Procedures Act, 5 U.S.C. § 705. Congress has the power to modify the application of these statutes in the management of public lands, and in section 318 it has exercised that power by adopting temporary standards and exemptions in regard to national forests in Washington and Oregon. As a result the preliminary injunction in these cases must be and hereby is vacated, and the parties will proceed in accordance with section 318.

3. It would be untimely to hold a hearing at this point, and the November 13, 1989, hearing date is hereby vacated.

4. A separate order will follow on whether the court should now dismiss these cases or retain jurisdiction.

The clerk is directed to send copies of this order to all counsel of record.

Dated: November 6, 1989.

/s/ William L. Dwyer
WILLIAM L. DWYER
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 87-1160-FR

PORTLAND AUDUBON SOCIETY, HEADWATERS, LANE COUNTY AUDUBON SOCIETY, OREGON NATURAL RESOURCES COUNCIL, THE WILDERNESS SOCIETY, SIERRA CLUB, INC., SISKIYOU AUDUBON SOCIETY, CENTRAL OREGON AUDUBON SOCIETY, KALMIOPSIS AUDUBON SOCIETY, UMPQUA VALLEY AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, PLAINTIFFS

v.

MANUEL LUJAN, JR., in his official capacity as Secretary, United States Department of Interior, DEFENDANT and

NORTHWEST FOREST RESOURCE COUNCIL, HUFFMAN & WRIGHT LOGGING CO., FRERES LUMBER CO., INC., LONE ROCK TIMBER CO., INC., SCOTT TIMBER CO., CLEAR LUMBER MANUFACTURING CORP., YONCALLA TIMBER PRODUCTS, INC., CORNETT LUMBER COMPANY, INC., ASSOCIATION OF O & C COUNTIES and BENNETT COUNTY, DOUGLAS COUNTY FOREST PRODUCTS COMPANY, MEDFORD ROGGEE FOREST PRODUCTS, INC., DEFENDANT-INTERVENORS

[Filed Dec. 21, 1989]

OPINION

FRYE, Judge:

The matter before the court is defendant's motion to dismiss for mootness (#397).

INTRODUCTION

This is an action for declaratory and injunctive relief filed by plaintiffs, Portland Audubon Society, Headwaters, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Salem Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council. Plaintiffs have alleged violations of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, the Oregon & California Lands Act, 43 U.S.C. § 1181, the Federal Lands Policy and Management Act, 43 U.S.C. § 1701 *et seq.*, the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*, and the Administrative Procedures Act (APA), 5 U.S.C. § 553 *et seq.*

On September 6, 1989, the United States Court of Appeals for the Ninth Circuit affirmed this court's determination that plaintiffs' first claim for relief under NEPA should be dismissed and remanded the action for further determination of the second, third and fourth counts of plaintiffs' complaint. *Portland Audubon Society v. Lujan*, 884 F.2d 1233 (9th Cir. 1989).

Plaintiffs thereafter renewed their motion for summary judgment on the second claim under the Oregon & California Lands Act and the fourth claim under the Migratory Bird Treaty Act. Defendant and intervenors oppose plaintiffs' motion for summary judgment on the grounds that Section 318 of the

Department of the Interior and Related Agencies Appropriations Act, 1990, Public Law 101-121 (October 23, 1989) (Section 318) requires dismissal of this action.

Plaintiffs respond that Section 318 is unconstitutional, and that even if Section 318 is constitutional, it does not render this action moot, and therefore the court should retain jurisdiction and deny the motion to dismiss.

ANALYSIS

Section 318 provides, in part, as follows:

> Without passing on the legal and factual adequacy of . . . the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections . . . (b)(5) of this section on . . . Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for . . . the case Portland Audubon Society et al. v. Manuel Lujan, J., Civil No. 87-1160-FR. The guidelines adopted by subsections . . . (b)(5) of this section shall not be subject to judicial review by any court of the United States.

Section 318(b)(6)(A).

As to the issue of the constitutionality of Section 318(b)(6)(A), this court adopts the reasoning and result of the United States District Court for the Western District of Washington in *Seattle Audubon*

Society v. Robertson, Civil No. 89-160-WD, in its opinion filed November 14, 1989.

Congress has determined that the management of federal lands during the fiscal year 1990 as provided in Section 318 is in compliance with all statutes relied upon by the plaintiffs in this action, and this court is precluded from determining otherwise. Contrary to plaintiffs' assertions that this court can and should grant declaratory relief prior to the end of fiscal year 1990, this court concludes that it is without jurisdiction to grant any relief to plaintiffs based upon the adequacy of the BLM's timber management plan for fiscal year 1990.

Plaintiffs argue that this court should retain jurisdiction to resolve issues after fiscal year 1990 because there is an identifiable point at which the court will again be asked to consider the legality of the BLM's decisions. Defendant and intervenors argue that this court has no jurisdiction over this action at the present time, and that, in any event, the court should exercise its discretion and dismiss this action without prejudice to plaintiffs to refile a new action challenging any future decisions of the BLM in light of the directives of Congress to the parties in Section 318 (c)(1) to attempt to reconcile the interests represented in this litigation.

The administrative proceedings challenged in paragraphs 19 through 24 of the complaint for declaratory and injunctive relief are outdated and by the close of fiscal year 1990 cannot be the basis for a case or controversy. A moot action is one where "the issues presented are no longer 'live,'" *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam), and this action, as it is pled, has been resolved by Congress and therefore is moot. The Congressional Conference Report, H.R. Conf. Rep. No. 2788, 101st Cong., 1st

Sess. 86 (1989), which states that Section 318 should not be "construed to moot future action after fiscal year 1990 in the *Portland Audubon Society v. Lujan* case against current BLM owl management activities," fails to take into consideration that the case before this court does not involve "future action after fiscal year 1990" because such action has yet to be taken.

The agency action in this case is significantly different from the agency action at issue in *Seattle Audubon Society v. Robertson*, Civil No. 89-160-WD, because it has not effect after fiscal year 1990. In *Seattle Audubon*, the record of decision of the United States Forest Service issued on December 8, 1988 sets the regional standards and guidelines for the protection of the spotted owl in the development of Forest Plans for the United States Forest Service for up to five years. The record of decision, at page 14, states:

> At any time, but not later than 5 years from the date of record, this decision shall be reviewed based upon new information from the Spotted Owl Research, Development and Application Program, and any necessary adjustments in management direction to sustain population viability of spotted owls shall be made through amendments or revisions of Forest Plans.

In the case before this court, the current decision of the BLM was not to supplement the existing Environmental Impact Statements (EIS) prior to 1990. The decision of the BLM State Director dated April 10, 1987 not to order a supplemental EIS prior to 1990, at page 2, specifically relies upon the facts that "BLM has already started (in 1986) to develop new land use plans (resource management plans (RMP)) for these seven [timber management] areas. Those

RMP's are currently expected to be completed by October 1990." Unlike the record of decision of the United States Forest Service, the existing BLM decision will have no effect after fiscal year 1990 and will be replaced by a new management decision which the plaintiffs will be free to challenge.

Plaintiffs rely upon a series of cases in which the courts have retained jurisdiction over an environmental dispute pending the completion of a particular construction project. For example, in *Environmental Defense Fund v. Armstrong*, 487 F.2d 814 (9th Cir. 1973), the court retained jurisdiction over an eight-year water project to insure compliance with the rules of the National Environmental Protection Agency and to provide adequate protection for the interests of the parties. In *Environmental Defense Fund v. Froehlke*, 348 F. Supp. 338 (W.D. Mo. 1972), *aff'd*, 477 F.2d 1033 (8th Cir. 1973), the court retained jurisdiction to review the sufficiency of an Environmental Impact Statement (EIS) to be prepared at later stages of a dam project.

It may be proper for a court to retain jurisdiction to resolve environmental disputes that arise during the completion of a particular construction project. However, the pending action presents a different sort of controversy. Plaintiffs ask the court to keep this case open so they can challenge the future management of BLM lands for timber sales. The management of BLM lands for timber sales is an ongoing function of the BLM, not a discrete project the BLM is completing. It is not the function of this court to oversee the BLM's management of federally-owned lands by continuing jurisdiction where no case or controversy exists. If this court were to retain jurisdiction under these circumstances, there could be no end

to this action so long as the BLM managed federally-owned lands for timber sales.

Dismissal of this action without prejudice to any party to challenge BLM actions after the 1990 fiscal year will not prejudice plaintiffs. Access to the federal courts is immediate. The requirement that a new complaint be filed is essential to the presentation of any future controversy. The filing fee is not prohibitive.

Dismissal of this action without prejudice to any future filing challenging agency actions after fiscal year 1990 advances congressional goals and judicial interests. The management of federally-owned lands by the Executive Branch is for Congress to oversee, and not the courts. The majority of the litigation in this action has been over the efforts of Congress to take the issues that are the subject of this litigation out of the courtroom and to concentrate efforts on the planning for the decade of the 1990's. Congress has directed that the defendant, Secretary of the Interior Manuel Lujan, Jr., name advisory boards on a district-by-district basis who represent the diversity of views in an attempt to provide the agency with recommendations in reviewing prospective timber sales. Section 318(c)(1). The BLM has long been under a directive of Congress to complete new resource management plans to replace the timber management plans that were used in the decade of the 1980's.

This court recognizes that there may be litigation challenging the agency decisions after the 1990 fiscal year. Future federal court litigation should be filed after the parties proceed in an orderly manner through the entire process established to challenge the management of federal lands. Any litigation

after fiscal year 1990 will represent new challenges to new efforts and will be more properly managed in a new case.

Defendant's motion to dismiss this action for mootness (#397) is granted without prejudice to the filing of any new action challenging the BLM owl management activities after fiscal year 1990.

DATED this 21st day of December, 1989.

/s/ Helen J. Frye
HELEN J. FRYE
United States District Judge

APPENDIX F

Section 318 of the Department of the Interior and Related Appropriations Act, Pub. L. No. 101-121, Tit. III, § 318, 103 Stat. 745-750 (1989), provides:

> (a) From funds appropriated under this Act or otherwise made available—
>
> (1) The Forest Service shall offer, notwithstanding the provisions of the Federal Timber Contract Payment Modification Act of 1984 (16 U.S.C. 618(a)(5)(C)), an aggregate timber sale level of seven billion seven hundred million board feet of net merchantable timber from the national forests of Oregon and Washington for fiscal years 1989 and 1990. Such timber sales shall be consistent with existing land and resource management plans or land and resource management plans as approved except, in the case of the Mapleton Ranger District of the Siuslaw National Forest, Oregon, such sales shall be consistent with the preferred alternative of the draft land and resource management plan and accompanying draft environmental impact statement dated October 1, 1986, pending approval of a final land and resource management plan for the Siuslaw National Forest: *Provided*, That of the seven billion seven hundred million board feet aggregate timber sale level for fiscal years 1989 and 1990, timber sales offered from the thirteen national forests in Oregon and Washington known to contain northern spotted owls shall meet an aggregate timber sale level for fiscal years 1989 and 1990 of

five billion eight hundred million board feet of net merchantable timber: *Provided further*, That the sales volume shall be distributed in the same proportion between Oregon and Washington national forests known to contain northern spotted owls based on the average sale volume for fiscal years 1986 through 1988.

(2) The Bureau of Land Management shall offer such volumes as are required in fiscal year 1990 to meet an aggregate timber sale level of one billion nine hundred million board feet for fiscal years 1989 and 1990 from its admininstrative districts in western Oregon.

(b)(1) In accordance with subsection (b)(2) of this section, all timber sales from the thirteen national forests in Oregon and Washington known to contain northern spotted owls prepared or offered pursuant to this section shall minimize fragmentation of the most ecologically significant old growth forest stands. "Old growth forest stands" are defined as those stands meeting the criteria according to Forest Service Research Publication Numbered PNW-447. In those instances where the Forest Service, after consultation with the advisory boards established pursuant to subsection (c) of this section, determines that the definition in Forest Research Publication Numbered PNW-447 is not fully applicable in national forests known to contain northern spotted owls, the Forest Service shall use old-growth definitions contained in its Pacific Northwest Regional Guide.

(2) To the extent that fragmentation of ecologically significant old growth forest stands is necessary to meet the timber sale levels directed by subsection (a)(1) of this section, the Forest Service shall minimize such fragmentation in the ecologically significant old growth forest stands on a national forest-by-national forest basis based on the Forest Service's discretion in determining the ecologically significant stands after considering input from the advisory board created pursuant to subsection (c) of this section. The habitat of nesting pairs of spotted owls which are not in the Spotted Owl Habitat Areas (SOHAs) described in subsection (b)(3) of this section shall be considered an important factor in the identification of ecologically significant old growth forest stands.

(3) No timber sales offered pursuant to this Oregon and Washington known to contain northern spotted owls may occur within SOHAs identified pursuant to the Final Supplement to the Enviromental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 as adjusted by this subsection:

(A) For the Olympic Peninsula Province, which includes the Olympic National Forest, SOHA size is to be 3,200 acres;

(B) For the Washington Cascades Province, which includes the Mt. Baker-Snoqualmie, Okanogan, Wenatchee, and Gifford-Pinchot National Forests, SOHA size is to be 2,600 acres;

(C) For the Oregon Cascades Province, which includes the Mt. Hood, Willamette, Rogue River, Deschutes, Winema, and Umpqua National Forests, SOHA size is to be 1,875 acres;

(D) For the Oregon Coast Range Province, which includes Siuslaw National Forest, SOHA size is to be 2,500 acres; and

(E) For the Klamath Mountain Province, which includes the Siskiyou National Forest, SOHA size is to be 1,250 acres.

(F) All other standards and guidelines contained in the Chief's Record of Decision are adopted.

(4) In planning for the preparation and offer of timber sales authorized in subsection (a)(1) of this section, the Forest Service, to the extent possible in areas proximate to SOHA sites identified in subsection (b)(3) of this section, should exercise discretion in selecting sites and/or silvicultural prescriptions in order to retain spotted owl habitat characteristics in such areas. The Forest Service should consider the relative location and quality of such areas contiguous to the SOHAs and should give higher priority to prequality and less important location than to areas of greater quality and more important location relative to the SOHAs.

(5) No timber sales offered pursuant to this section on Bureau of Land Management lands in western Oregon known to contain northern spotted owls shall occur within the 110 areas identified in the December 22, 1987 agreement, except sales identified in said agreement, between the Bureau of Land Management and the

Oregon Department of Fish and Wildlife. Not later than thirty days after enactment of this Act, the Bureau of Land Management, after consulting with the Oregon Department of Fish and Wildlife and the United States Fish and Wildlife Service to identify high priority spotted owl area sites, shall select an additional twelve spotted owl habitat areas. No timber sales may be offered in the areas identified pursuant to this subsection during fiscal year 1990.

(6)(A) Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The

guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

(B) The Forest Service is directed to review and revise as appropriate the decision adopted in the December 1988 Record of Decision referenced in subsection (b)(6)(A) of this section and shall consider any new information gathered subsequent to the issuance of the Record of Decision, including the interagency guidelines for conservation of northern spotted owls developed by the Interagency Scientific Committee to address conservation of the northern spotted owl. This review, and any resulting changes to the December 1988 decision determined to be necessary by the Forest Service are to be completed and in effect not later than September 30, 1990.

(c)(1) The Secretaries of Agriculture and the Interior shall name advisory boards on a national forest-by-national forest and Bureau of Land Management district-by-district basis which shall be comprised of not more than seven individuals who, in the appropriate Secretary's judgment, represent a diversity of views. In the process of selecting individuals to serve on the advisory boards, the Secretaries shall make every effort to recognize the diversity of views and perspectives and allow parties which represent a cross-section of those views to participate in making recommendations in the selection of board members, provided, that every effort will be made to ensure the advisory boards are comprised of an equal number of representatives of environmental and business concerns. The advisory boards shall be named not later than thirty days after enactment of this Act. The advisory boards

shall provide recommendations to the Forest Service and the Bureau of Land Management in reviewing prospective timber sales which shall meet the timber sale levels directed by this section prior to their offer. The advisory boards shall present their advice within fifteen or forty-five days after receipt of the necessary review documents. The fifteen-day period applies to single sales and the forty-five-day period applies to multiple sales. The members of the advisory boards authorized by this section shall serve without compensation or reimbursement of expenses. The Forest Service and the Bureau of Land Management are authorized to use available funds for the services of professional, independent facilitators to assist in the work of the advisory boards.

(2) The Forest Service and Bureau of Land Management shall consider the recommendations of the advisory boards once such boards are established pursuant to this section, including any suggested modifications of individual sales. The Forest Service and Bureau of Land Management shall also consider recommendations made by the United States Fish and Wildlife Service on those timber sales conferred upon under section 7(a)(4) or, if the spotted owl is listed as a threatened or endangered species, consult under section 7(a)(2) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1536(a)(2) and (a)(4)) prior to the offer of any subsequent timber sale in fiscal year 1990. These recommendations shall be considered regardless of whether the agreement provided in subsection (f)(1) of this section has been reached, entered into, and accepted by the relevant court.

Adoption or rejection of such recommended modifications shall not require preparation of additional environmental documents, notwithstanding any other provision of law.

(d) Notwithstanding any other provision of law, there shall be not more than one level of administrative appeal of any decision by the Forest Service or the Bureau of Land Management to undertake any activity directed by this section for timber sales to be prepared, advertised, offered, and awarded during fiscal year 1990 from the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls. If an administrative stay is granted in any such appeal the Regional Forester or the Interior Board of Land Appeals shall issue a final decision on the merits within forty-five days of the date of issuance of such stay. Notwithstanding any other provision of law, any party seeking to challenge a decision made after the date of enactment of this Act to prepare, advertise, offer, or award a timber sale in fiscal year 1990 from the thirteen national forests and Bureau of Land Management lands in western Oregon known to contain northern spotted owls need not exhaust their administrative remedies prior to filing suit. Nothing in this subsection shall alter the administrative appeal requirements of the Forest Service or Bureau of Land Management.

(e) Nothing in this section shall affect interagency cooperation among the Forest Service, the Bureau of Land Management, and the United States Fish and Wildlife Service under sections

7(a)(2) and 7(a)(4) of the Endangered Species Act and its regulations.

(f)(1) Not later than two days after enactment of this Act, the Forest Service shall submit to plaintiffs in the captioned case Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160, a list of sales which had been prepared for offer in fiscal year 1989 and which contain at least 40 acres of suitable spotted owl habitat. Not later than fourteen days after receipt of such list, plaintiffs to the suit referenced in this subsection may enter into an agreement with the Forest Service releasing for sale not less than one billion one hundred million board feet of net merchantable timber. Such sales must be available for advertisement not later than fourteen days after the agreement required by this subsection is reached. Such timber sales selected shall not be subject to further judicial review by any court of the United States.

(2) If the agreement specified in subsection (f)(1) of this section is reached, then those timber sales described in the list submitted to plaintiffs pursuant to subsection (f)(1) of this section but not contained in the agreement authorized by subsection (f)(1) of this section shall not be offered for sale in fiscal year 1990.

(3) If the agreement authorized under subsection (f)(1) of this section is not implemented within the timeframes prescribed in subsection (f)(1) of this section, one billion one hundred million board feet of net merchantable timber from such sales submitted to plaintiffs pursuant to subsection (f)(1) of this section shall be se-

lected and modified as appropriate by the Forest Service in accordance with the provisions of this section. Selected sales shall be prepared, advertised, offered, awarded and operated notwithstanding any provision of law that is a basis for any stay, injunction or order issued in the proceeding identified in subsection (f)(1) of this section; *Provided*, That nothing in this subsection shall affect rights available under the Contract Disputes Act (41 U.S.C. 601 et seq.).

(4) The Forest Service shall, for each respective timber sale, lift its own stay or apply to the appropriate court for the lifting of the restraining order or injunction whose basis has been withdrawn by this section.

(5) Timber sales selection pursuant to subsections (f)(1) or (f)(3) of this section shall be based on the following criteria: (1) proportional distribution between Oregon and Washington national forests known to contain northern spotted owls based on the average sale volumes for fiscal years 1986 through 1988; (2) proportional distribution to the extent possible among the thirteen national forests known to contain northern spotted owls in Oregon and Washington based on the average sale volumes for fiscal years 1986 through 1988; and (3) to the extent possible, selection of sales outside the habitat of nesting pairs of spotted owls which are not in the Spotted Owl Habitat Areas described in subsection (b)(3) of this section.

(g)(1) No restraining order or preliminary injunction shall be issued by any court of the United States with respect to any decision to prepare, advertise, offer, award, or operate a timber sale or timber sales in fiscal year 1990

from the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls. The provisions of section 705 of title 5, United States Code, shall not apply to any challenge to such a timber sale: *Provided*, That the courts shall have authority to enjoin permanently, order modification of, or void an individual sale if it has been determined by a trial on the merits that the decision to prepare, advise, offer, award, or operate such sale was arbitrary, capricious or otherwise not in accordance with law: *Provided further*, That any challenge to a timber sale must be filed in Federal District Court within fifteen days of the date of initial advertisement of the challenged timber sale: *Provided further*, That for forty-five days after the filing of a challenge to a timber sale the affected agency shall take no action to award a challenged timber sale. Civil actions filed under this section shall be assigned for hearing at the earliest possible date and shall take precedence over all other matters pending on the docket of the court at that time except for criminal cases: *Provided further*, That the court shall render its final decision relative to any challenge within forty-five days from the date such challenge is brought, unless the court determines that a longer period of time is required to satisfy the requirements of the United States Constitution.

(2) Notwithstanding any other provision of law, the court may set rules governing the procedures of any such proceeding which set page limits on briefs and time limits on filing briefs and motions and other actions which are shorter

than the limits specified in the Federal rules of civil or appellate procedure.

(3) In order to reach a decision within forty-five days, the Federal District Court may assign all or part of any such case or cases to one or more Special Masters, for prompt review and recommendations to the court.

(h) The Forest Service, the Bureau of Land Management, and the United States Fish and Wildlife Service shall submit reports updating their findings and progress as determined by the process recognized under subsection (e) of this section on a monthly basis to the President of the Senate and the Speaker of the House of Representatives for appropriate referral. Such reports shall also include information on the extent to which recommendations of the advisory boards established pursuant to subsection (c) of this section were integrated into timber sale decisions as well as reasons for modifying or not adopting recommendations made by the advisory boards. Such reports shall be submitted as directed beginning on December 1, 1989, and ending on September 30, 1990.

(i) Except for provisions of subsection (a)(1) of this section, the provisions of this section apply solely to the thirteen national forests in Oregon and Washington and Bureau of Land Management districts in western Oregon known to contain northern spotted owls. Nothing contained in this section shall be construed to require the Forest Service or Bureau of Land Management to develop similar policies on any other forest or district in Oregon or Washington.

(j) The advisory boards established under this section shall not be subject to the Federal Advisory Committee Act (86 Stat. 770).

(k) Timber sales offered to meet the requirements of subsection (a) of this section shall be subject to the terms and conditions of this section for the duration of those sale contracts. All other provisions of this section shall remain in effect until September 30, 1990.

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No. 90-1596

In the Supreme Court of the United States

OCTOBER TERM, 1990

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

BRIEF OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, ET AL. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK C. RUTZICK*
CYNTHIA L. HULL
Preston Thorgrimson Shidler Gates & Ellis
111 S.W. Fifth, Suite 3200
Portland, Oregon 97204
(503) 228-3200
Counsel for Northwest Forest Resource Council, et al.

* *Counsel of Record*

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NO. 90-1596

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

BRIEF OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, ET AL. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Northwest Forest Resource Council, Huffman & Wright Logging Co., Freres Lumber Co., Inc., Lone Rock Timber Co., Inc., Scott Timber Co., Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Inc., Douglas County Forest Products Company, Medford Corporation, Rogge Forest Products, Inc., Washington Contract Loggers

Association and William Pickell (hereafter collectively referred to as "NFRC"),[1] defendants-intervenors-appellees below,[2] submit this brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by the Solicitor General on behalf of F. Dale Robertson and Manuel Lujan, Jr.[3]

STATEMENT OF THE CASE

NFRC adopts the Statement of the Case set forth in the petition.

NFRC supplements the Statement of the Case in the petition as follows:

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[1] None of the respondents has any parent, subsidiary or affiliated corporation except Lone Rock Timber Co., Inc. is an affiliate of Sun Studs, Inc. and Scott Timber Co. is an affiliate of Roseburg Forest Products Co.

[2] At the time the Ninth Circuit issued the ruling for which review is sought, respondents Washington Contract Loggers Association and William Pickell were plaintiffs-appellees in Civil No. C89-99T(WD) in the Western District of Washington, which was consolidated with *Seattle Audubon Society v. Robertson*, Civil No. C89-160WD. Subsequently, Civil No. C89-99T(WD) was dismissed and these parties were allowed to intervene in Civil No. C89-160WD as defendants-intervenors.

[3] Respondents NFRC received the Solicitor General's petition on April 24, 1991. Under Sup. Ct. R. 12.4 this response is being filed within 20 days after the date of receipt.

A. Background of federal timber sale programs.

In 1897 Congress authorized the establishment of national forests "to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C.A. § 475 (West Supp. 1991). For almost a century the national forests have served as an important source of timber supply for the American people.

The national forests of the Pacific Northwest are America's most abundant source of public timber, supplying almost half of the entire Forest Service national timber sale program.[4] Twenty-three national forests in Washington, Oregon and northern California supplied approximately five billion board feet[5] of timber per year to the American people in the 1980s.[6]

In western Oregon the Department of Interior Bureau of Land Management operates a separate timber sale program under the authority of the Oregon and California Lands Act, 43 U.S.C. § 1181, *et seq.* (West

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[4] Forest Service, United States Dep't of Agriculture, *The Forest Service Program for Forest and Rangeland Resources: A Long-Term Strategic Plan*, 6-16 (1990).

[5] A board foot is a measure of volume of wood equal to one foot by one foot by one inch.

[6] Forest Service, United States Dep't of Agriculture, *Production, Prices, Employment, and Trade in Northwest Forest Industries, Second Quarter 1990*, Table 15 (1990) ("*Production, Prices*").

Supp. 1991), which contributes an additional one billion board feet of federal timber every year.[7]

The forest products industry in Washington and Oregon employed over 133,000 workers in 1990.[8] Every million board feet of timber sold by the Forest Service or BLM contributes approximately nine full-time jobs to the industry for one year.[9]

Both the Forest Service and the BLM offer all their timber for sale to the highest bidder on a competitive bid basis, with as many as ten companies bidding on a single "timber sale," usually comprising several million board feet of timber. In 1990, the Forest Service sold Douglas fir logs in Washington and Oregon at approximately $550 per thousand board feet.[10] The revenue from these competitive auctions allows the Forest Service to contribute over $400 million per year to the federal treasury in proceeds from its Pacific Northwest timber sales.[11] Additional millions of dollars of federal income tax revenues are generated by the employment created from these timber sales.

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[7] *Id.*, Table 15.

[8] *Id.*, Table 20.

[9] *Id.*, Table 15, Table 20.

[10] *Id.*, Table 74.

[11] Forest Service, United States Dep't of Agriculture, *Timber Sale Program Information Reporting System, Regional Summary, Fiscal Year 1989*, Appendix B at 3 (March 8, 1990).

Forest Service and BLM timber provides more than one-third of all timber harvested in the Pacific Northwest,[12] a greater proportion than in other parts of the country. The result has been the growth of a large component of the forest products industry in the Pacific Northwest which owns no private timber and depends largely or completely on purchases of federal timber for the source of raw materials to operate their mills. Many of these federally-dependent mills are small, independent, family-owned businesses which have operated in timber-dependent communities for decades.

Congress has recognized the dependence of the small mills on federal timber by establishing a "small business set-aside" program administered by the Small Business Administration which guarantees that certain proportions of federal timber sales may be purchased only by companies qualifying as a small business under the program, thus assuring a steady supply of timber for these small companies. *See Duke City Lumber Co. v. Butz*, 382 F. Supp. 362 (D.D.C. 1974), *aff'd* 539 F.2d 220 (D.C. Cir. 1976), *cert. denied sub nom*, *Duke City Lumber Co. v. Knebel*, 429 U.S. 1039 (1977).

Thirteen of the most productive national forests in the "Douglas fir" region west of the Cascade mountains in Washington and Oregon provide habitat for the northern spotted owl, as do all six of the BLM's administrative

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[12] *Production, Prices*, Table 74.

districts in western Oregon.[13] In 1989 litigation relating to the spotted owl substantially disrupted the Forest Service and BLM timber sale programs in these areas, cutting off several billion board feet of timber sales which had been expected to be offered that year. Congress responded directly to this disruption by enacting Section 318 of the Department of the Interior and Related Agencies Appropriations Act, Fiscal Year 1990, Pub. L. 101-121, 103 Stat. 745 (1989) ("Section 318").

B. The 12 enjoined timber sales.

On December 18, 1990, following the remand from the Ninth Circuit judgment of September 18, 1990, as amended on October 31, 1990, the District Court for the Western District of Washington issued a permanent injunction against the award of 12 timber sales which the Forest Service had prepared, advertised and competitively auctioned in September, 1990 under the authority of Section 318. The 12 sales are located in the Siskiyou, Siuslaw and Willamette National Forests in Oregon within the Douglas fir region. The combined volume of timber in the 12 sales is 83,687,000 board feet. Docket No. 686 (Declaration of Kathy O'Halloran, October 22, 1990, Exhibit A). Based on the most recent sale price of $550 per thousand board feet for Douglas fir logs, these 12 sales can be expected to produce over $46 million of revenue for the federal government. Of these funds, 25% -- over $11 million -- would be paid to local counties in

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[13] Four national forests in northern California which also provide habitat for the northern spotted owl are not involved in this appeal.

lieu of property taxes. 16 U.S.C. § 500 (West Supp. 1991).

C. The six challenged timber sales.

In addition, Seattle Audubon Society challenged six other timber sales which the Forest Service offered for purchase in September, 1990. On September 29, 1990, the District Court for the Western District of Washington dismissed the challenges to the six sales on the ground that they were untimely under Section 318(g)(1).

On April 26, 1991, the Court of Appeals for the Ninth Circuit reversed the district court and ruled that the challenges to these six sales could proceed under the doctrine of equitable tolling despite the statutory time limit. These six timber sales, from the Mt. Baker-Snoqualmie, Willamette, Siuslaw, Wenatchee and Rogue River National Forests of Washington and Oregon, within the Douglas fir region, include approximately 25,540,000 board feet of timber. At the $550 per thousand board foot price the sales would produce over $14 million of revenue for the federal government.

Five of these six sales have been awarded to the high bidder at the auction. In each case the high bidder has been required to provide the Forest Service with a substantial down payment and large performance and payment bonds to assure successful completion of the contract. The district court has not yet ruled on the merits of the Audubon Society challenge to the six sales.

The Ninth Circuit opinion of April 26, 1991 on equitable tolling may allow challenges to other timber

sales auctioned and awarded under Section 318. To date, no such additional challenges have been filed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision below held an important act of Congress unconstitutional based on a plainly erroneous reading of the statute and a clear misinterpretation of governing principles of statutory construction.

A. The decision below plainly misinterpreted Section 318 by failing to understand that Congress substituted a statutory owl management plan for fiscal year 1990 in place of the agency plans which were challenged in the pending litigation, and in doing so temporarily repealed other applicable environmental laws.

Congress enacted Section 318 in the face of legal challenges to discretionary agency management plans designed by the Forest Service and the BLM to protect spotted owls. To achieve a "1-year breathing space," 135 Cong. Rec. H6506 (daily ed. October 3, 1989) (remarks of Rep. AuCoin), in this litigation, Congress took the simple step of substituting -- for fiscal year 1990 only -- a nondiscretionary statutorily mandated spotted owl management plan which the agencies were required to follow. Congress based its plan on the existing agency plans, but expanded the protected areas by more than 300,000 acres.

The unmistakable intent of Congress was that timber sales could go forward if they complied with the statutory plan. This clear intent is manifested by the words of the

statute and repeated in the legislative history. The statute:

- *Requires* the Forest Service to offer 7.7 billion board feet of timber sales and the BLM to offer 1.9 billion board feet of timber sales, Section 318(a)(1), (2); and

- *Prohibits* such sales from occurring in the areas that were statutorily designated for spotted owl protection, Section 318(b)(3), (5).

Congress' mandate to each agency to sell the specified volume of timber outside the designated areas of protection could only mean that the agencies need not comply with the otherwise applicable environmental laws in making those sales, since it was the legal challenges under these very laws that had disrupted timber sales in 1989 and created the crisis which Section 318 was intended to resolve. Leaving the existing laws in effect, as the Ninth Circuit concluded had been intended by Congress, would mean that Section 318 had accomplished nothing -- an intent which cannot be attributed to Congress.

Congress' evident intent was that adherence to the Section 318 spotted owl plan made it unnecessary to comply with other existing environmental laws relating to spotted owls. Section 318 can only be understood as a temporary repeal of those other laws. While words of repeal are not expressed in the statute, the intent to enact such a repeal cannot seriously be argued.

B. The Ninth Circuit mistakenly believed that it could not find Section 318 to be an implied repeal of other environmental laws.

Despite the evident congressional intent to override other environmental laws to the extent necessary to achieve the mandated timber sale levels in Section 318, and despite the Ninth Circuit's recognition of its duty to interpret a statute in a manner that renders it constitutional, the Ninth Circuit held that it was *barred* from adopting a "saving interpretation of subsection (b)(6)(A)" as a temporary repeal of the underlying laws in the pending litigation. App. 16a.[14] It reached this conclusion based on a plainly erroneous belief that Congress *cannot* repeal a substantive law *by implication* in an appropriations measure. *Id.* Applying this rule, the Ninth Circuit held itself constrained to adopt a construction of the statute which, in its view, renders it unconstitutional. *Id.*

The Ninth Circuit's rule of statutory interpretation regarding appropriations measures is contrary to 100 years of precedent from this Court and many lower courts. Congress has on many occasions repealed substantive laws by implication in appropriations acts, and never before this case has a court suggested that Congress lacks the power to do so.

In *Mathews v. United States*, 123 U.S. 182 (1887), the Supreme Court held that an appropriations act had "repealed, by necessary implication" earlier substantive

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[14] References to "App." are to the Appendix attached to the Solicitor General's Petition.

laws that were contrary to the terms of the appropriations enactment. *Id.* at 186. *Accord, United States v. Mitchell*, 109 U.S. 146, 149-50 (1883) (appropriations act passed by Congress in 1881 had by implication repealed a contrary provision of earlier substantive law).

In *United States v. Dickerson*, 310 U.S. 554 (1940), the Court held that Congress had repealed a substantive law by implication through the enactment of an appropriations act with contrary language, a conclusion based not on an explicit repeal but on "a considered weighing of every relevant aid to construction." *Id.* at 562 (footnote omitted).

In *United States v. Will*, 449 U.S. 200 (1980), the Court again held that Congress had repealed an earlier substantive law by implication through the enactment of appropriations measures with contrary language. *Id.* at 222-24. *Will* clearly illustrates the difference between the rule adopted by the Ninth Circuit in this case and the proper rule as enunciated by this Court. *Will* states that repeals by implication are "not favored," especially when the repealing measure is in an appropriations bill. *Id.* at 221-22. Nonetheless, the Court in *Will* found that in the statutes in question Congress *had* enacted a repeal by implication of the law in question. *Id.* at 222-23.

In contrast, the decision below held that repeals by implication in an appropriations act are not merely disfavored, but are *prohibited*. App. 16a. It refused to consider whether subsection (b)(6)(A) repealed substantive laws by implication on the ground that Congress had

no right to do so and therefore the statute could not have that effect. *Id.*

While the decision below cited *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), in support of its rule, *Hill* fails to support the decision below; it merely agrees with *Will* that repeals by implication are *disfavored* in an appropriations act -- not *prohibited*. The *Hill* court agreed that Congress *could* repeal a substantive law by implication in an appropriations act, but held that it had not done so in that case. *Id.* at 190-193.

The only other authority cited by the court below, *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, ___ U.S. ___, 109 S. Ct. 3229 (1989) also fails to support this doctrine. *Portland Audubon* merely holds that the law in question *did not* repeal any law by implication, not that such a repeal is prohibited.

Other courts of appeals have reached contrary results on this issue. "Appropriations acts are just as effective a way to legislate as are ordinary bills relating to a particular subject. An appropriation act may be used to suspend or modify prior Acts of Congress." *Friends of the Earth v. Armstrong*, 485 F.2d 1, 9 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974). *Accord*, *United States v. Burton*, 888 F.2d 682 (10th Cir. 1989); *Republic Airlines, Inc. v. United States Dep't of Transp.*, 849 F.2d 1315 (10th Cir. 1988); *American Fed'n of Gov't Employees v. Campbell*, 659 F.2d 157 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 820 (1981); *Director, Office of Workmen's Compensation Program v. Alabama By-Products Corp.*, 560 F.2d 710, 719 (5th Cir. 1977).

The petition should be granted to reconcile the decision below with these many conflicting authorities.

C. *The Ninth Circuit's flawed constitutional analysis led it to plainly misinterpret Section 318 by holding that the statute mandates findings of fact in pending litigation.*

Finding that it was unable to give Section 318 the interpretation clearly intended by Congress as a temporary repeal of other applicable environmental laws, the Ninth Circuit interpreted the statute to "direct[] the court to reach a specific result and make certain factual findings" in the two pending district court cases. App. 14a.

Yet in fact neither of the district courts ever reached any "specific result" or made any "findings" pursuant to the statute. The district court in Washington did nothing all year with regard to the challenge to the Forest Service plan, other than decline to resolve the merits of the case on summary judgment. The district court in Oregon dismissed the case as moot on jurisdictional grounds without making any findings at all.

If the supposed evil of this statute was that it compelled district courts to make certain findings of fact and to reach certain results, App. 15a, then the evil never occurred.

The reason neither district court made any rulings or findings on the merits of the two cases, a reason apparently overlooked by the Ninth Circuit, is that the beginning phrase of subsection (b)(6)(A) explicitly states that

the statute is ***not*** "passing on the legal and factual adequacy" of the Forest Service and BLM spotted owl plans challenged in the two case. Congress explicitly directed that the courts were ***not*** to draw any conclusions or make any findings concerning the two challenged plans based on this statute.

The Ninth Circuit apparently overlooked this phrase of the statute. In footnote 3 of the opinion below, App. 16a, the court quotes virtually identical language in the Conference Report on the statute, but declines to ascribe significance to it because of supposedly conflicting legislative history. *Id.* The Ninth Circuit was apparently unaware that the same words appear in *the statute*, where they must be given effect. The Ninth Circuit never addressed this part of the law.[15]

D. The Ninth Circuit overlooked the explicit bar to judicial review in subsection (b)(6)(A).

The Ninth Circuit failed completely to address the alternative basis for upholding the constitutionality of subsection (b)(6)(A) -- the statute's explicit prohibition of judicial review of the statutory guidelines. The last sentence of subsection (b)(6)(A) states: "The guidelines

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[15] The supposedly conflicting legislative history is not conflicting at all. Congress did not intend Section 318 to alter the application of environmental laws to the earlier ***agency*** management plans, but explicitly stated in the challenged portion of subsection (b)(6)(A) that the ***statutory*** management plan for fiscal year 1990 adopted ***in place of*** the challenged agency plans met all requirements of the environmental laws. The legislative history merely confirms the distinction Congress drew between the statutory plan and the prior agency plans.

adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." This explicit withdrawal of jurisdiction is the type of enactment which has been upheld throughout the history of our nation. *Glidden Co. v. Zdanok*, 370 U.S. 530, 567 (1962); *In re Hall*, 167 U.S. 38, 42 (1897). Yet the decision below effectively allowed the district court to nullify the statutory guidelines by allowing legal challenges to timber sales that fully complied with the guidelines.

Since the statutory guidelines were in effect during fiscal year 1990 rather than the challenged agency plans, and since judicial review of the statutory guidelines was explicitly barred by the statute, the courts lacked jurisdiction to take any action in these cases during fiscal year 1990 -- and were jurisdictionally barred from making the findings supposedly compelled by the statute. The Ninth Circuit never addressed this explicit bar on judicial review.

CONCLUSION

The Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

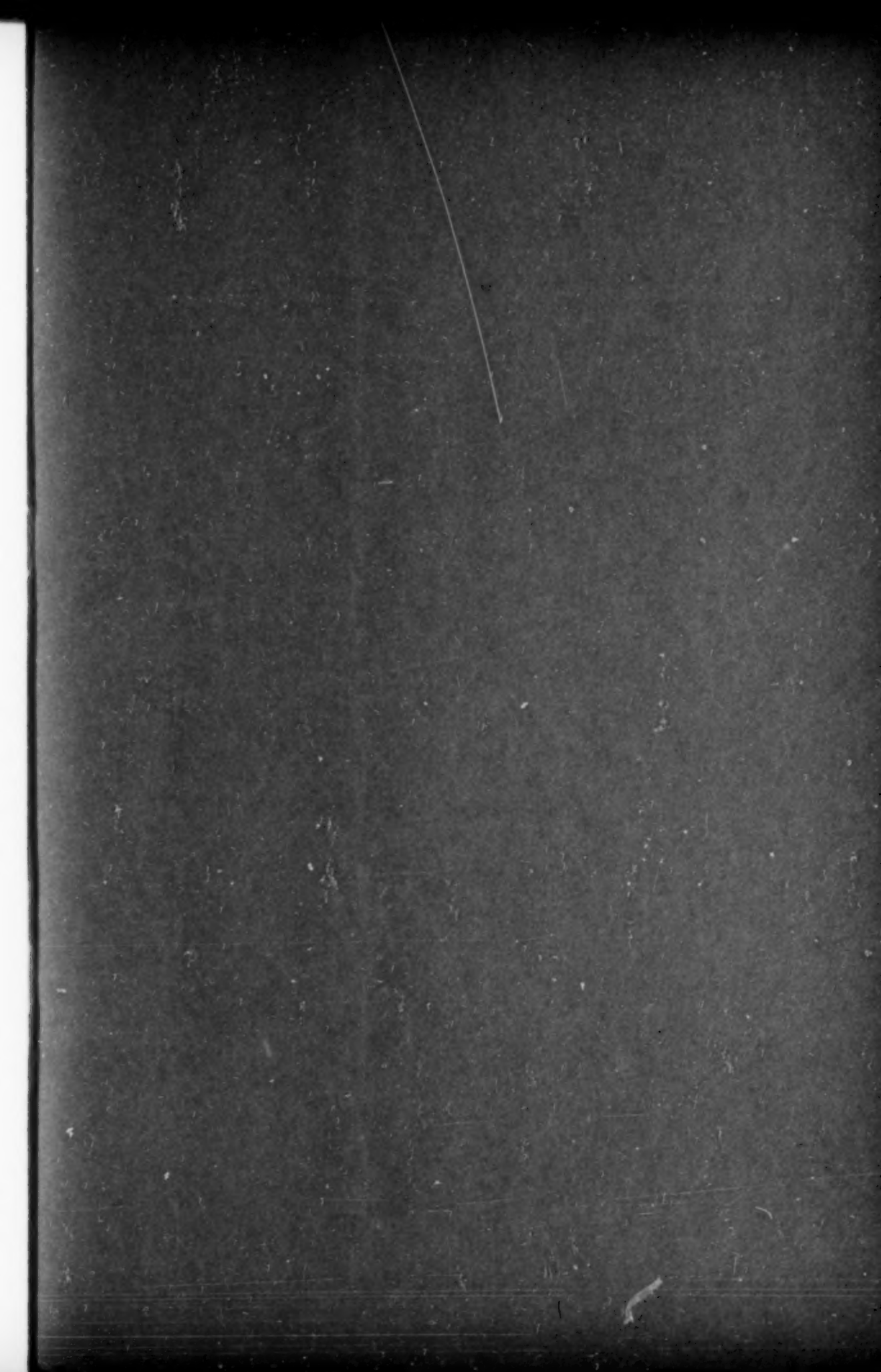
Dated this 14th day of May, 1991.

Respectfully submitted,

MARK C. RUTZICK*
CYNTHIA L. HULL
PRESTON THORGRIMSON
SHIDLER GATES & ELLIS
3200 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 228-3200

Counsel for Northwest Forest
Resource Council, et al.

**Counsel of Record*



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No. 90-1596

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Petitioners,

v.

SEATTLE AUDUBON SOCIETY, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

VICTOR M. SHER
TODD D. TRUE*
SIERRA CLUB LEGAL DEFENSE FUND
216 First Avenue South, Suite 330
Seattle, Washington 98104
(206) 343-7340

Attorneys for Plaintiffs Seattle Audubon Society, et al.

JOHN BONINE
MIKE AXLINE
University of Oregon
School of Law
1101 Kincaid Street, Room 329
Eugene, Oregon 97403
(503) 345-3823

Attorneys for Plaintiffs Oregon Natural Resources Council and Lane County Audubon Society

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit correctly ruled that section 318(b)(6)(A) of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747 (1989) – a unique one-year, one-time appropriations rider – violates the constitutional principle of separation of powers by directing the federal courts how to interpret and apply existing laws in a pending case without repealing or otherwise changing those laws?

PARTIES TO THE PROCEEDINGS

Respondents accept petitioners' description of the parties to the proceedings except that the National Audubon Society also was a plaintiff in the district court in the Western District of Washington and Salem Audubon Society, Sierra Club, and The Wilderness Society were also plaintiffs in the district court in the District of Oregon. These same parties also were appellants in the court of appeals. All of the respondent plaintiffs in No. C89-160(WD) (W.D. Wash.) and all of the respondent plaintiffs in No. C87-1160-FR (D. Ore.) are not-for-profit corporations and none of them has any parent companies, subsidiaries, or affiliates. This statement is provided pursuant to Supreme Court Rule 29.1.

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No. 90-1596

In The

Supreme Court of the United States

October Term 1990

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,

Petitioners,

v.

SEATTLE AUDUBON SOCIETY, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Seattle Audubon Society, *et al.* (hereinafter "SAS"), respectfully request that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

SAS accepts petitioners' identification of the opinion below except that the opinion of the court of appeals

reported at 914 F.2d 1311 is the fully amended opinion of that court as issued on October 30, 1990.

JURISDICTION

SAS accepts petitioners' statement of jurisdiction.

STATUTORY PROVISIONS INVOLVED

The full text of section 318(b)(6)(A) of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747 (1989) (hereinafter "section 318"), is set forth in the Petition for a Writ of Certiorari at pages 2-3. All of the other provisions of section 318 are set forth as Appendix F to the Petition. The relevant portions of the conference report accompanying the statute, H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. (1989), are set forth in Appendix F to this Brief, *infra*, 105a-125a.

STATEMENT OF THE CASE

The Solicitor General's petition for a writ certiorari in this case seeks review of an opinion of the United States Court of Appeals for the Ninth Circuit that declared unconstitutional one sentence of one provision – subsection (b)(6)(A) – of one section – 318 – of a one-year, one-time appropriations law that has now expired.[1] Although

[1] The conference report on section 318 states that the "measures included in this provision have been provided on an interim basis for fiscal year 1990 only. . . . " H.R. Conf. Rep. No. 264, *supra*, at 87 (App. F. at 118a).

the continuing litigation in this case does indeed involve "the ongoing controversy over logging in old growth forests in Oregon and Washington and the impact of that logging on the northern spotted owl," Cert. Pet. at 4 (quoting *Seattle Audubon Society v. Robertson*, 914 F.2d at 1312), the court of appeals opinion for which the Solicitor now seeks review has no impact on this controversy, nor on any legal issue in the controversy.

In addition, Congress has not reenacted any part of section 318 – or any similar law – since fiscal year 1990, nor is any future reenactment of such a provision probable. Likewise, no part of any provision of section 318 has been interpreted by any other court of appeals, nor will it be interpreted by another court because the section affected only the states of Washington and Oregon and only during fiscal year 1990.[2]

Finally, since the court of appeals' ruling in September of 1990, the administrative action that formed the basis of the case against the Forest Service in the Western District of Washington (hereinafter the *"SAS"* case) has been rescinded by the agency and replaced by a different

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[2] Moreover, the court of appeal's ruling addressed in the Solicitor's petition affects, at most, 16 Forest Service timber sales in Washington and Oregon offered for sale during fiscal year 1990, out of a total of more than 1000 timber sales offered during the fiscal year under section 318. The appellate court's ruling does not affect *any* timber sales offered by the Bureau of Land Management. In short, out of a total timber sale program of 8.8 *billion* board feet of timber to be offered from federal lands in Washington and Oregon during fiscal year 1990, the court of appeals decision that the government now asks this Court to review affects no more than 100 *million* board feet – about one percent of the timber volume offered under section 318.

administrative decision. This subsequent agency action recently also has been declared illegal, but on grounds completely unrelated to the court of appeals decision for which the Solicitor now seeks review. *See* App. B, *infra*, 38a-65a (order granting summary judgment against the Forest Service); App. A, *infra*, 1a-37a (order granting injunctive relief against the Forest Service).[3] Similarly, the Bureau of Land Management decision challenged in the District of Oregon (hereinafter the *"PAS"* case) has now been altered by a new decision that may or may not be set aside in the future for violations of federal environmental laws. *See* App. E, *infra*, 88a-104a (order dismissing plaintiffs' complaint).

The role that now-expired section 318 once played in this controversy is set out more fully below and in the opinions of the district courts and court of appeals reproduced in Appendices A, B, C, E, and G to this Brief. This history confirms the very limited and fact-specific nature of the court of appeals decision at issue in this petition for a writ of certiorari.

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[3] The Forest Service abandoned its earlier administrative plan because its own scientists and those of other federal agencies had concluded that the plan would not adequately protect the northern spotted owl and hence would not meet the requirements of the laws that govern the Forest Service. *See* App. A, *infra*, at 18a (Memorandum Decision and Injunction) ("in the Fall of 1990 the Forest Service admitted that the ROD was inadequate after all – that it would fail to preserve the northern spotted owl").

A. The Nature and History of Section 318.

1. Section 318 was a unique and limited statutory provision.

Congress enacted section 318 as a one-time, one-year statute "for making timber sales on Federal lands in Washington and Oregon, for managing habitat for northern spotted owls, and for minimizing fragmentation of significant old-growth forest stands." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. at 87 (1989), App. F, *infra*, at 118a. In enacting this unique legislation, Congress stated:

> The extraordinary measures included in this section, particularly with regard to judicial processes, have been reluctantly agreed to because of the failure of the agencies to take steps on their own to resolve these matters in a manner which could have prevented the current situation. These measures included in this provision have been provided on an interim basis for fiscal year 1990 only . . . .

Id., App. F, *infra*, at 118a. True to this statement, Congress has not reenacted *any* of the provisions in section 318 for subsequent fiscal years. Moreover, as the statute itself stated, all of its provisions expired on September 30, 1990, *see* App. F, *infra*, at 117a (section 318(k)), with the single exception that timber sales actually offered during fiscal year 1990 still are subject to the terms and conditions of section 318 for the life of the timber sale contract, *id.*[4] In short, section 318 was a unique statute limited to its own particular time and circumstances. Consequently, the court of appeals decision for which the Solicitor seeks

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[4] As explained below at note 7, this exception itself now appears to preclude any new legal challenge to timber sales sold under section 318 on the grounds raised in these cases.

this Court's review also is necessarily unique and limited to its own facts and circumstances.

2. Section 318(b)(6)(A), the provision of section 318 that the court of appeals struck down, was also unique.

One of Congress' purposes in enacting section 318 was to prevent the plaintiffs in these cases from proceeding on their claims against the defendant federal agencies during fiscal year 1990. *See* App. G, *infra*, at 137a-139a (Order on Motions Heard Dec. 5, 1990). Congress, however, did not seek to accomplish this goal either by repealing the statutes that formed the bases of the plaintiffs' claims in these cases or by withdrawing the federal courts' jurisdiction to hear the plaintiffs' claims under these statutes. Instead, Congress attempted to direct the courts how to interpret and apply the existing environmental laws to the plaintiffs claims in these cases during fiscal year 1990:

> . . . Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al. v. F. Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc. et al. v. F. Dale Robertson*, Civil No. 89-99 (order granting preliminary injunction) and the case *Portland Audubon Society et al. v. Manuel Lujan, Jr.*, Civil No. 87-1160-FR.

Section 318(b)(6)(A).

In other provisions of section 318, Congress specifically and expressly limited the courts' jurisdiction to entertain the plaintiffs' pending claims as they affected particular planned timber sales, *see, e.g.*, section 318(f)(1), Cert. Pet., App. F at 51(a) ("such timber sales . . . shall not be subject to further judicial review by any court of the United States."), or prescribed specific procedures for the plaintiffs to follow in making any new claims under section 318, *see, e.g.*, section 318(g)(1), Cert. Pet., App. F at 53a ("any challenge to a timber sale must be filed in Federal District Court within fifteen days of the date of initial advertisement of the challenged timber sale"). Nowhere, however, did Congress expressly or by implication repeal the broad environmental laws of general application that formed the bases of the plaintiffs' claims in these cases.[5] Nor did Congress expressly or by implication withdraw federal court jurisdiction of the plaintiffs' claims under these laws.

Instead, in section 318(b)(6)(A), Congress "determined and directed" how the courts were to interpret and apply the general environmental laws to the plaintiffs' claims in these cases during fiscal year 1990. The court of appeals addressed only this singular aspect of section 318 in its opinion.

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[5] In section 318(f)(3), Congress did attempt to repeal expressly the laws at issue in this case for the specific and limited subset of timber sales addressed in that subsection. *See* section 318(f)(3), Cert. Pet., App. F at 52a ("Selected sales shall be prepared, advertised, offered, awarded and operated notwithstanding any provision of law that is a basis for any stay, injunction or order issued in the proceedings identified in subsection (f)(1) of this section. . . . "). No one has challenged this provision of section 318, not does it have any bearing on this petition for a writ of certiorari.

B. The Court of Appeals' Ruling on the Constitutionality of Section 318(b)(6)(A).

Following Congress' passage of section 318, plaintiffs challenged, first in the district court and then on appeal, the unique provision of section 318 – subsection (b)(6)(A) – that attempted to direct the courts how to resolve the claims in these cases in a particular way for fiscal year 1990. Plaintiffs argued that this language violated the constitutional separation of powers doctrine because, without repealing the existing laws at issue in this case, or withdrawing the court's jurisdiction of claims under these laws, Congress attempted to direct the courts how to apply the existing laws to the plaintiffs' claims. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871); *see also* L. Tribe, *American Constitutional Law*, § 3-5 at 50 (2d ed. 1988).

On November 14, 1989, the district court in the Western District of Washington rejected the plaintiffs' challenge to the constitutionality of section 318(b)(6)(A). Cert. Pet., App. C. On December 21, 1989, the district court in Oregon, faced with a similar constitutional challenge to the language of section 318(b)(6)(A), followed suit. Cert. Pet., App. E at 37a-38a.

The plaintiffs in *SAS* appealed the district court's decision upholding section 318(b)(6)(A) as constitutional under the provisions of 28 U.S.C. § 1292(b), while the plaintiffs in *PAS* appealed that court's dismissal of their case. The court of appeals denied the *SAS* plaintiffs' request for emergency relief from the provisions of section 318(b)(6)(A). *See* App. G, *infra*, at 131a (Order on Motions Heard Dec. 5, 1990). The cases were then consolidated and the appeals expedited and argued on April 3, 1990. The court of appeals decided both cases in a single

opinion first issued on September 18, 1990, and subsequently amended on October 30, 1990.

The court of appeals ruled that:

> Section 318 does not, by its plain language, repeal or amend the environmental laws underlying this litigation, even though some subsections add additional requirements. The clear effect of subsection (b)(6)(A) is to direct that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5), then the government will have done what is required under the environmental statutes involved in these cases. Thus, if the Secretary does follow subsections (b)(3) and (b)(5) by observing their limitations on owl habitat, then the Secretary will be deemed in fact to have met as well the requirements of several environmental statutes.
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> . . .
>
> This is what [*United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871)] and subsequent cases agree is constitutionally proscribed.

914 F.2d at 1316 (Cert. Pet., App. A at 13a-14a) (footnote omitted). The court then went on to hold that:

> We must uphold a statute if "it is fairly possible to interpret the [challenged] statute in a manner that renders it constitutionally valid." . . . That Congress could possibly have written a valid statute, however, does not mean that we can "fairly" interpret the statute that Congress in fact enacted as constitutionally valid. The language of section 318 is clear: Congress not only legislated a forest management plan, §§ 318(b)(3), (b)(5), but also directed the courts to find that that plan satisfied the environmental laws underlying the ongoing litigation. § 318(b)(6)(A). In doing so, Congress did not amend or repeal laws, as it unquestionably could do, but rather prescribed a rule for the decision of a cause in a particular way, without

> changing the underlying laws, as it unquestionably cannot do.

Id. at 1317 (Cert. Pet., App. A at 15a-16a) (citations and footnotes omitted).[6]

Based on these holdings, the court of appeals concluded that "[t]he first sentence of subsection 318(b)(6)(A) violates the separation of powers doctrine." *Id.* (Cert. Pet., App. A at 17a)(footnote omitted).

C. Proceedings in the District Courts and the Court of Appeals Following the Court of Appeals' Ruling on the Constitutionality of Section 318(b)(6)(A).

1. Proceedings Related to the Ruling on the Constitutionality of Section 318(b)(6)(A).

The proceedings in the district courts and the court of appeals as a result of the court of appeals' invalidation of section 318(b)(6)(A) have been quite limited and they are now over. In these proceedings, *no* Bureau of Land Management timber sales offered under section 318 have been affected in any way. Only 18 Forest Service timber sales have even been challenged. Sixteen of these 18

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[6] In dicta, the court noted further that:

> even if we could interpret section 318 as a temporary repeal of the environmental laws at issue in the underlying litigation, then section 318 would amount to an implied partial repeal of the environmental statutes. That is what we held in *Portland Audubon Society v. Hodel*, 866 F.2d [302,] 307 [(9th Cir.), *cert. denied*, 109 S. Ct. 3229 (1989)], Congress could not do in an appropriations measure.

914 F.2d at 1317 (Cert. Pet., App. A at 16a). Petitioners incorrectly treat this dicta as a principle holding in the court of appeals' decision, *see* Cert. Pet. at 18-19, while ignoring the court's actual holding quoted above in the text.

Forest Service sales have been enjoined for violations of the environmental laws. *See* App. D, *infra*, at 85a-88a (order on renewed motion for summary judgment re six timber sales); App. G., *infra*, at 126a-143a (Order on Motions Heard Dec. 5, 1990). At this time, there is no likelihood that anyone will commence additional challenges to timber sales offered under section 318 on any of the grounds raised in these cases simply because the provisions of section 318 that are unaffected by the court of appeals ruling now insulate these sales from judicial review.[7]

Of the 16 Forest Service fiscal year 1990 timber sales presently enjoined for violations of the environmental laws, 12 of the sales were enjoined by the district court in an order entered on December 17, 1990. The plaintiffs challenged these sales within 15 days of initial advertisement as required by section 318(g)(1). The bases for the challenges to these sales, however, were barred by section 318(b)(6)(A) until the court of appeals invalidated that provision in the opinion at issue here. A copy of the district court's order enjoining these 12 sales is reproduced as Appendix G to this Brief.

The remaining 4 Forest Service timber sales that have been enjoined in the wake of the Ninth Circuit's ruling

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[7] Section 318(g)(1) required challenges to any timber sales to be filed within 15 days of initial public advertisement of the sale. Section 318(g)(1) (Cert. Pet., App. F at 53a). Section 318(k) continues the application of this limitations period to timber sales offered under section 318. Section 318(k) (Cert. Pet., App. F at 55a). In any event, the plaintiffs in *SAS* have waived their right to challenge additional Forest Service fiscal year 1990 timber sales on the grounds raised in these cases. *See* App. A, *infra*, at 31a (Memorandum Decision and Injunction).

striking down parts of section 318(b)(6)(A) were initially challenged, along with two other sales, outside the fifteen-day limitations period of section 318(g)(1), but within 15 days following the court of appeals decision regarding subsection (b)(6)(A). Plaintiffs argued that the challenges were timely because the doctrine of equitable tolling suspended the fifteen-day limitations period while plaintiffs were unconstitutionally prevented from challenging timber sales for violations of the environmental laws by section 318(b)(6)(A).

The district court rejected plaintiffs' argument that the challenges were timely and plaintiffs appealed. On April 26, 1991, the court of appeals, following this Court's recent decision in *Irwin v. Veterans Administration*, 111 S. Ct. 453 (1990), ruled that the doctrine of equitable tolling is available in this case and tolled the limitations period of section 318(g)(1) for the six sales plaintiffs had challenged. *Seattle Audubon Society v. Robertson*, 931 F.2d 590, ___ (9th Cir. 1991) (App. C, *infra*, at 82a). On remand, plaintiffs renewed their request for an injunction against these sales. The district court, on May 24, 1991, enjoined four of the six sales but refused to enjoin two sales where substantial logging already had occurred. *See* App. D at 85a-87a (order on renewed motion re six timber sales).

2. Subsequent Proceedings Unrelated to the Provisions of Section 318.

Although the Solicitor implies that the court of appeals decision striking down section 318(b)(6)(A) has had important consequences for this case, in fact, the significant legal rulings in these cases since the Ninth Circuit's decision on the constitutionality of subsection 318(b)(6)(A) have not involved in any way either the

provisions of section 318 or the court of appeals decision regarding that statute. The reasons that none of the major rulings on remand have involved section 318 or the issues related to the statute's constitutionality are simple: (1) section 318 has expired and Congress has not reenacted any part of it; and, (2) both the Forest Service and the Bureau of Land Management have made new administrative plans or decisions for spotted owl habitat that are completely different from those in place at the time Congress enacted section 318. In short, section 318 is history and not very relevant history at that.

a. The New Forest Service and Bureau of Land Management Administrative Decisions for Managing Spotted Owl Habitat.

On September 28, 1990, only ten days after the Ninth Circuit ruled that section 318(b)(6)(A) violated the constitutional separation of powers doctrine, the Forest Service – citing reasons unrelated to the Ninth Circuit's ruling – vacated its administrative plan that had provided a background for many of the provisions of section 318 and plaintiffs' claims against the agency in this case. *See* 55 Fed. Reg. 40413 (October 3, 1990). In place of the old plan, the agency announced an interim approach to managing suitable northern spotted owl habitat. *Id.* Several days earlier, on September 25, 1990, the Bureau of Land Management likewise announced a new decision for managing spotted owl habitat. *See* App. E, *infra*, at 92a-94a (opinion dismissing complaint).

In the *SAS* case, this change in administrative plans led the plaintiffs to file an amended complaint that challenged the agency's new plan for managing owl habitat and to the dismissal as moot of the plaintiffs' claims

against the old plan. *See* App. B, *infra*, at 45a, 61a-63a (Order on Motions for Summary Judgment and For Dismissal). In *PAS*, the district court has recently dismissed the plaintiffs' existing complaint, *see* App. E, and the plaintiffs have moved to file an amended complaint to reassert their claims against that agency's owl habitat management decisions that the district court concluded – for reasons unrelated to section 318 – were not properly before it. If the district court in Oregon allows the *PAS* plaintiffs to amend their complaint, they will continue their challenge to the Bureau of Land Management's program for logging spotted owl habitat. This continued challenge, however, will have nothing to do with either section 318 or the court of appeals decision invalidating subsection (b)(6)(A).

b. Plaintiffs' Legal Challenges to the Agencies' New Administrative Actions.

The plaintiffs in *SAS* have succeeded in their challenge to the Forest Service administrative program announced on September 28, 1990. On March 7, 1991, the district court ruled that this new program violated the requirements of the National Forest Management Act, 16 U.S.C. §§ 1600 *et seq.*, *see* App. B (Order on Motions for Summary Judgment and For Dismissal), and on May 23, 1991, following an eight-day hearing, the court permanently enjoined the Forest Service from selling additional timber sales in owl habitat until the agency complies with the law, *see* App. A (Memorandum Decision and Injunction). The court also established a compliance schedule for the agency. App. A, *infra*, at 21a-23a, 37a. Although these recent rulings certainly affect the Forest Service's ability to sell for logging suitable spotted owl habitat, the

rulings have *nothing* to do with either section 318 or the court of appeals opinion that the government has asked this Court to review.

REASONS FOR DENYING THE PETITION

A. Summary of Argument.

The Solicitor has failed to offer any compelling reasons why this Court should review the court of appeals opinion. More importantly, the Solicitor has obscured the unique, fact- and time-specific nature of the court of appeals opinion. Because the Ninth Circuit's decision addresses only a limited, expired and no longer relevant statutory provision, this case is simply not appropriate for Supreme Court review.

It is axiomatic that this Court does not exercise its discretionary jurisdiction to review decisions of the courts of appeal that are not significant in any way. *See* Supreme Court Rule 10; *Triangle Improvement Council v. Ritchie*, 402 U.S. 497 (1972) (Harlan, J., concurring). The court of appeals decision for which the Solicitor seeks review in this case fails to meet any standard of significance even though it involves a decision invalidating on constitutional grounds a provision of an act of Congress.[8]

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[8] Indeed, Congress recently repealed 28 U.S.C. § 1252 (repealed 1988), which provided mandatory review in this Court of decisions of the lower courts declaring Acts of Congress unconstitutional. The purpose of this repeal was to avoid automatic review in this Court of unimportant or insignificant decisions invalidating a congressional enactment. *See* H.R. No. 660, 100th Cong., 2d Sess. at 2, 9-11, *reprinted in* 1988 U.S. Code Cong. & Admin. News 766, 774-776. This case presents just such an unimportant constitutional adjudication.

The reason this case is not significant is simple: the law the court of appeals interpreted was a unique, one-time statute that has expired and that does not have any continuing application to additional government activities. *See* Section 1 below.

It also is fundamental to this Court's discretionary jurisdiction that it does not review decisions of the courts of appeal where there is no existing or potential conflict between the rulings of the different courts of appeal. *See* Supreme Court Rule 10. Here there is no existing or potential conflict. The statute that the court of appeals decision addressed applied to only two states within the Ninth Circuit for only one year – and the statute itself has now expired. Nor is there a broader conflict among the circuits regarding the interpretation of this Court's decision in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), or one concerning the scope of the separation of powers doctrine, as the Solicitor suggests. *See* Section 2 below.

Finally, even if this case were significant (which it is not), and even if there were a conflict among the circuits regarding *Klein* and separation of powers (which there is not), the Court should not grant review of the court of appeals decision in this case because the decision correctly applies uncontroversial constitutional principles to a particular and unique set of facts. *See* Section 3 below.

B. Argument

1. The Court of Appeals Decision Addressed in the Solicitor's Petition Has No Practical Significance.

The Solicitor's petition claims that the "litigation unfolding on remand vividly shows . . . the very dilemma Congress sought to avoid when it enacted section 318."

Cert. Pet. at 25-26. But this on-going litigation actually exemplifies "a deliberate and systematic refusal by the Forest Service and the [U.S. Fish & Wildlife Service] to comply with the laws protecting wildlife." App. A, *infra*, at 21a (Memorandum Decision and Injunction). This is indeed a serious dilemma – and one that Congress recognized in enacting section 318, *see* App. F, *infra*, at 118a (conference report) – but it is not in any way a dilemma occasioned by the court of appeals decision.

That decision found that one sentence of section 318(b)(6)(A) violated the constitutional separation of powers doctrine. 914 F.2d at 1317 (Cert. Pet., App. A at 17a). This sentence – indeed the entire statute that contained the sentence – has now expired. Moreover, in separate litigation, the courts have ruled that the government did all that it was required to do to comply with the provisions of section 318. *See Gifford Pinchot Alliance v. Butruille*, 742 F. Supp. 1077, 1083 (D. Ore. 1990) ("*GPA I*"); *Gifford Pinchot Alliance v. Butruille*, 752 F. Supp. 967, 970-72 (D.Ore. 1990) ("GPAII"). Furthermore, Congress has not reenacted section 318, or subsection (b)(6)(A), or any similar statutory provision. In fact, Congress in the conference report on section 318 indicated that it would not do so. *See* App. F, *infra*, at 118a (the "measures included in this provision have been provided on an interim basis for fiscal year 1990 only . . . ").

In addition, the actual effects of the court of appeals decision on timber sales from federal lands in Washington and Oregon are inconsequential. Of the more than 1000 timber sales offered by federal agencies under section 318 during fiscal year 1990 while the statute was in effect, the court of appeals decision allowed plaintiffs to enjoin only 16 Forest Service timber sales for violations of

the environmental laws. Even though the court of appeals recently ruled that plaintiffs in the *SAS* case might have an opportunity to file additional timely challenges to timber sales sold under section 318, *see Seattle Audubon Society v. Robertson*, 931 F.2d 590, ___ (9th Cir. 1991) (App. C, *infra*, at 82a-84a), the plaintiffs have unequivocally elected not to pursue these challenges. *See* App. A, *infra*, at 31a (Memorandum Decision and Injunction).[9]

More important still, the continuing litigation in these cases has nothing to do with section 318, subsection (b)(6)(A), or the court of appeals decision. *See supra* at 13-15 (discussing history of cases following the court of appeals decision).[10]

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[9] The fact that several billion board feet of timber sold under section 318 are still subject to the terms of the statute through section 318(k), *see* Cert. Pet at 25, does not affect this conclusion. Nothing in subsection (k) or elsewhere in the statute would revive the right to file new challenges under section 318 to timber sales that have been advertised, offered and awarded to a timber purchaser. The fact that many existing timber sale contracts are affected by section 318(k) is thus purely a matter of historic, but not practical or legal, interest.

[10] The court of appeals decision also has no real legal significance for many of the same reasons that it has no practical importance. The statute the court of appeals addressed has expired and has not been reenacted. Even while it existed, the law affected only two states, Washington and Oregon. Moreover, as explained below in sections 2 and 3, the court of appeal's decision applies an uncontroversial distillation of the separation of powers doctrine correctly to a peculiar and now historic set of legislative facts.

In light of these circumstances, the Solicitor's assertion that the court of appeals decision has "substantial practical significance" rings hollow. Cert. Pet. at 25. Indeed, the situation presented in this petition is much like the situation in *Triangle Improvement Council v. Ritchie*, 402 U.S. 497 (1971) (Harlan, J., concurring), where the Court dismissed a writ of certiorari as improvidently granted. In the *Triangle Improvement Council* case, Congress repealed the statute that the lower court had interpreted after this Court agreed to hear the case. Moreover, the provisions of the repealed statute continued to apply to fewer than 10 individuals. *Id.* at 500. As Justice Harlan observed, "every individual alleging that he has been abused by the exercise of federal power should, as a general matter, be heard, even where his situation becomes unique due to repeal or cessation of the actions he challenges." *Id.* Nonetheless, Justice Harlan concluded that the *Triangle Improvement Council* case presented "a classic instance of a situation where the exercise of our powers of review would be of no significant continuing national import." *Id.*; *see also Sanks v. Georgia*, 401 U.S. 144 (1971) (appeal challenging constitutionality of Georgia statute dismissed following repeal of state law at issue because the Court could not determine to what extent adjudication of issues in the case would be material to any further litigation ensuing on remand).

This case presents the Court with the same situation addressed in *Triangle Improvement Council* and *Sanks*, albeit at one step earlier in the process – before a petition for a writ of certiorari or an exercise of appellate jurisdiction has occurred. Here, the Solicitor seeks review of an expired statute that will not be reenacted. Moreover, the effects of the decision that the Solicitor brings before this

court are limited to a handful of timber sales that barely constitute one percent of the sales offered under section 318. As in *Triangle Improvement Council*, adjudication of this case would not be "a provident expenditure of the energies of the Court." 402 U.S. at 503.

2. The Court of Appeals Decision Creates Neither a Specific nor a General Conflict with the Opinions of this Court or Other Courts of Appeal.

The Solicitor asserts that the court of appeals adopted a "substantially overbroad" construction of this Court's opinion in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), *see* Cert. Pet. at 19, and that the court's opinion "cannot be squared" with other circuits' readings of *Klein*, *id*. The Solicitor does not, however, argue – and could not argue – that the court of appeals' interpretation of section 318(b)(6)(A) conflicts with this Court or any other appellate court's interpretation of that statute. Nor does the decision rely on an incorrect interpretation of *Klein* that conflicts with this Court or any other court's reading of *Klein*. In short, the Solicitor cannot show that this case falls within the scope of Supreme Court Rule 10.1(a).

a. The Court of Appeals Opinion Does Not and Will Not Conflict With Other Appellate Interpretations of Section 318.

Section 318 applied only to the states of Washington and Oregon and only during fiscal year 1990. The statute has now expired. The time for challenging timber sales offered under its provisions also has passed. *See* Section 318(g)(1) (Cert. Pet., App. F at 53a). Even though the limitations period of section 318 was equitably tolled in

one instance, *see* (App. C, *Seattle Audubon Society v. Robertson*, 931 F.2d at ___ *infra*, at 82a), that period of equitable tolling too has passed and, in any event, the plaintiffs in *SAS* have formally waived their right to pursue additional challenges to timber sales offered pursuant to section 318 on the environmental grounds raised in this litigation. App. A, *infra*, at 31a (Memorandum Decision on Injunction).

Under these circumstances, no other appellate court is ever likely to interpret any provision of section 318, let alone address the constitutionality of subsection (b)(6)(A). The statute simply never affected any area outside the Ninth Circuit and whatever effects the court of appeals decision once had within the circuit are over and settled. Neither the outcome of the government's current appeals from the district court decisions enjoining 16 Forest Service timber sales after section 318(b)(6)(A) was struck down, nor any of the other on-going proceedings in these cases, will require the court of appeals to reëxamine the constitutionality of section 318(b)(6)(A). Accordingly, there is not now and there never will be conflicting opinions of the courts of appeal regarding section 318(b)(6)(A).

b. The Court of Appeals Opinion Does Not Conflict With the Opinions of this or any Other Court that Interprets *Klein*.

The Solicitor, unable to identify a specific conflict between the court of appeals opinion and the opinions of this or any other appellate court, resorts to the assertions that the court of appeals opinion invokes a "substantially overbroad interpretation of [*Klein*]." Cert. Pet. at 19, that this Court's prior opinions applying or citing *Klein* are "confusing," *id.* at 19, 21, and that the courts of appeal

have given *Klein* "disparate" treatment, *id.* at 22. None of these assertions is accurate.

The court of appeals opinion reads *Klein* to stand for the narrow proposition that "Congress [cannot] prescribe a rule for the decision of a cause in a particular way[] without changing the underlying laws." 914 F.2d at 1317 (Cert. Pet., App. A at 16a). The court did *not* state, as the Solicitor claims, that "*Klein* [prohibits] Congress from enacting changes in substantive law to function as rules of decision in pending federal court actions." Cert. Pet. at 23. Indeed, the Ninth Circuit explicitly recognized that Congress *can* repeal or change the applicable substantive laws to affect a pending case. 914 F.2d at 1316-17 (Cert. Pet., App. A at 14a-15a) (citing and distinguishing as permissable Congress' actions in *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419 (9th Cir. 1989) and ruling that in passing section 318 to address these cases "Congress did not amend or repeal laws, as it unquestionably could do"). The court, however, concluded that Congress had failed to make, either expressly or by implication, such changes in the underlying laws at issue in this case. *See* Section 3 below.

The court of appeals reading of *Klein* is not in any sense overbroad or unusual. In discussing the *Klein* decision and the separation of powers doctrine, Professor Laurence Tribe has observed that, under its narrowest and least controversial formulation:

> the separation of powers does limit congressional regulation of the decisionmaking processes of article III courts at least this much: if Congress does not purport to alter the governing procedural and substantive law, Congress cannot force its interpretation of that law upon the federal courts in particular cases.

L. Tribe, *American Constitutional Law*, § 3-5 at 50 (2d ed. 1988); *see also* G. Gunther, "Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the On-Going Debate," 36 Stan. L.Rev. 895, 910 (1984) ("virtually all commentators agree that, even if congress can withdraw jurisdiction from the federal courts in a whole class of cases, it cannot allow a federal court jurisdiction but dictate the outcomes of cases"). It is precisely this narrow formulation of the separation of powers doctrine that the court of appeals adopted and applied in this case. 914 F.2d at 1316-17 (Cert. Pet., App. A at 14a-15a).

None of the decisions of this Court that the Solicitor cites conflict with the court of appeals' reading of *Klein* as the Solicitor attempts to suggest. *See* Cert. Pet. at 21. First, *Hart v. United States*, 118 U.S. 62, 66 (1886), and *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 152 (1872), are two additional reconstruction era cases that addressed the effects of contemporaneous legislation and pardons on claims against the United States. In neither *Hart* nor *Carlisle* did the Court narrow the holding of *Klein* or eschew the basic principle that Congress cannot direct the judiciary how to apply a particular existing law in a particular pending case without changing either the underlying law or the courts' jurisdiction.[11]

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[11] Indeed, the Court's reasoning in *Hart* confirms this basic point. There, the Court observed:

> [W]e do not depart, in the least, from what was held, on the subject of pardons, in . . . *United States v. Klein*, [80 U.S.] 13 Wall. 128 [(1871)] . . . . If the joint resolution [in this case] had said nothing on the subject of a pardon, no pardon could have had the effect to authorize the payment out of a general

(Continued on following page)

Second, the more recent case of *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (plurality opinion), does not undercut the basic formulation of the separation of powers doctrine that the court of appeals applied in this case for the simple reason that the Court's concern in *Glidden* was to determine the judicial nature of the Court of Claims, *id.* at 552, not to define the reach of Congress' powers to affect pending cases. Finally, the court of appeals decision does not conflict with this Court's opinion in *United States v. Sioux Nation*, 448 U.S. 371, 404-405 (1980). As the Court noted, the statute at issue in *Sioux Nation* did not attempt to direct the courts how to apply an existing law to a particular case without changing that law; instead, in *Sioux Nation* Congress "waived the defense of res judicata so that a legal claim could be resolved on the merits." *Id.* at 406. The court of appeals decision in this case simply does not conflict with any of the decisions of this Court

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(Continued from previous page)

> appropriation, of a debt which a law of Congress had said should not be paid out of it. The pardon cannot have such effect ascribed to it [that is, to authorize a payment] merely because the joint resolution says that it shall not have such effect.

118 U.S. at 67 (citations omitted). Thus the law at issue in *Hart* did not attempt to direct the judiciary how to decide a case under an existing but unchanged law as the statute did in *Klein*; instead, the joint resolution in *Hart* merely prohibited the payment of certain classes of claims against the United States, regardless of whether the claimant had received a pardon from the President.

that the Solicitor cites; nor does it involve any "confusing" formulation of the separation of powers doctrine as the Solicitor implies.[12]

Thus while the outer contours of the separation of powers doctrine, and the *Klein* decision as discussed in the different opinions of this Court, may not have been fully articulated yet, the only principle the court of appeals drew from *Klein* and this Court's decisions regarding the separation of powers doctrine is a narrow and unassailable one: although Congress unquestionably can change the law at issue in a case and may withdraw the courts' jurisdiction of claims under an existing law, it cannot direct the federal courts how to interpret and apply an existing and unchanged law in a particular case. 914 F.2d at 1316-17 (Cert. Pet., App. A at 14a-15a).

This simple principle also does not conflict with the decisions from other courts of appeal as the Solicitor claims. In fact, *Temple University v. United States*, 769 F.2d 126, 134 n. 4 (3d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986), and *Demartino v. Commissioner*, 862 F.2d 400, 408 (2d Cir. 1988), to the extent they address *Klein* at all, are consistent with the separation of powers principles that the court of appeals applied in this case. The Solicitor's citation of the dissenting opinion in *Barcellos & Wolfsen v.*

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[12] The other opinions of this Court that the Solicitor cites, *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 467 (1989) (Kennedy, J., concurring in the judgment), and *Austin v. United States*, 155 U.S. 417, 424-425 (1894), involve, on the one hand, the holding of *Klein* that relates to the separation of powers between the legislative and executive branches (a problem not at issue in this case), and, on the other, the simple application of a statute restricting the courts' jurisdiction to hear certain claims. Again, the court of appeals opinion conflicts with neither case.

Westlands Water Dist., 899 F.2d 814, 830 (9th Cir.) (Fernandez, Circuit Judge, dissenting), *cert. denied*, 111 S.Ct. 555 (1990), for its passing reference to *Klein* does not create a conflict among the opinions of the Ninth Circuit; and, in any event, the dissent in *Barcellos & Wolfsen* addressed a separation of powers issue not before the court of appeals in this case: the scope of Congress' powers to alter a "judgment that ha[s] fixed the rights of the parties." *Id.* at 830 (Fernandez, Circuit Judge, dissenting). Finally, the two opinions of the United States Court of Appeals for the District of Columbia that the Solicitor cites, *Bartlett v. Bowen*, 816 F.2d 695 (D.C. Cir. 1987), and *National Juvenile Law Center, Inc. v. Regnery*, 738 F.2d 455, 465 (D.C. Cir. 1984), address Congress' powers to limit the jurisdiction of the courts to hear constitutional claims, another separation of powers issue that was not before the court of appeals in this case. In sum, while the *Klein* opinion addressed several facets of the multi-faceted separation of powers doctrine, there is no conflict among the courts of appeal over the one facet of *Klein* that applies to this case: that the separation of powers doctrine precludes Congress from directing the courts how to apply an existing law in a pending case without changing that law.

The Solicitor offers this Court no basis for granting the petition for a writ of certiorari on the grounds that the court of appeals decision conflicts with the opinions of this Court or other courts of appeal. *See* Supreme Court Rule 10.1(a).

3. The Court of Appeals Decision Correctly Applies Uncontroversial Constitutional Principles to a Particular and Unique Set of Facts.

The Solicitor also asserts that "[i]n its haste to strike down Section 318(b)(6)(A) as unconstitutionally prescribing a rule of decision, the court of appeals misapprehended the statutory terms," Cert. Pet. at 16-17, and improperly "invok[ed] the 'doctrine disfavoring repeals by implication,' " *id.* at 18. The Solicitor is wrong on both counts.

As the Solicitor correctly notes, section 318 did require the Forest Service and Bureau of Land Management to attempt to sell certain quantities of timber during fiscal year 1990, *see* section 318(a) (Cert. Pet., App. F at 43a-44a); *GPA II*, 752 F. Supp. at 970-72. It also established guidelines for identifying these timber sales, *see* sections 318(b)(1) to (5) (Cert. Pet. App. F at 44a-47a), and barred judicial review of the guidelines in these subsections, *see* section 318(b)(6)(A) (Cert. Pet., App. F at 47a-48a) (second sentence); *Seattle Audubon Society v. Robertson*, 914 F.2d at 1317 & n. 4 (Cert. Pet., App. A at 17a). *But*, as the Ninth Circuit concluded, section 318 did not amend or repeal the National Environmental Policy Act, 42 U.S.C. § 4332, the National Forest Management Act, 16 U.S.C. § 1600 *et seq.*, the Migratory Bird Treaty Act, 16 U.S.C. § 703, or any of the other statutes at issue in these cases. *Seattle Audubon Society v. Robertson*, 914 F.2d at 1316-17 (Cert. Pet., App. A at 14a-16a).

The Solicitor apparently disagrees with this conclusion for the petition states that section 318 "amounted to nothing other than a 'temporary modification of the environmental laws.' " Cert. Pet. at 18 (citation omitted). The Solicitor, however, offers no explanation of how section 318 accomplished this modification. There was certainly

no express language of repeal or modification for thes general environmental laws anywhere in section 318 or sub section (b)(6)(A).[13] Nor has the Solicitor identified a conflic between implementation of these general laws and compli ance with the guidelines of sections 318(b)(1) to (5), as woul be necessary to even suggest a repeal by implication. *Se* Cert. Pet. at 17-18. Instead, as the court of appeals found, an as the Solicitor does not dispute, some subsections of sectio 318 "add additional requirements" to those of the existin laws at issue in these cases. 914 F.2d at 1316 (Cert. Pet., App A at 13a) (footnote omitted).

More importantly, the Solicitor ignores entirely a crit ical aspect of the court of appeals holding in this case After noting that some subsections of section 318 "ad additional requirements" to the existing laws, and notin that it must uphold a statute if it is fairly possible t "interpret [it] in a manner that renders it constitutionall valid," *id.*, the court ruled that although:

> Congress could possibly have written a valid statute, [this] does not mean that we can "fairly" interpret the statute that Congress in fact enacted as constitutionally valid. The language of section 318 is clear: Congress not only legislated a forest management plan, §§ 318(b)(3), (b)(5), but also directed the courts to find that that plan satisfied the environmental laws underlying the ongoing litigation. § 318(b)(6)(A). In doing so, Congress did not amend or repeal laws, as it unquestionably could do, but rather prescribed a rule for the decision of a cause in a particular way, without

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[13] Section 318(f) does repeal the application of these gen eral laws to a limited and specific set of timber sales, *se* section 318(f) (Cert. Pet., App. F at 52a) (quoted in note 5 *supra*), but this language does not affect the plaintiffs' claim generally, nor does the Solicitor suggest otherwise.

> changing the underlying laws, as it unquestionably cannot do.

Id. (Cert. Pet., App. A at 15a-16a) (citations and footnotes omitted). The language of section 318(b)(6)(A) is, as the court of appeals noted, clear and direct. It neither expressly nor by implication repeals the environmental laws at issue in this case. To rule otherwise would have required the court of appeals to rewrite the statute for Congress, a task the Constitution prohibited it from undertaking.[14] The Solicitor, however, apparently would have this Court substitute a judicial version of section 318(b)(6)(A) that passes constitutional muster for the language Congress actually drafted and enacted.[15] The court of appeals cannot be faulted for refusing such an invitation and this Court should not accept it now.

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[14] Contrary to the Solicitor's claim, the court of appeals did not construe *Klein* as prohibiting Congress from enacting changes in substantive law to function as rules of decision in pending federal court actions. *See* Cert. Pet. at 23, 24 (citing cases). Instead, the court of appeals simply ruled that the plain and unambiguous language of section 318(b)(6)(A) did not change the substantive law in the underlying litigation in this case. 914 F.2d at 1316 (Cert. Pet., App. A at 15a-16a).

[15] The court of appeals did note, after it had properly concluded that section 318 directed the court in a pending case to reach a particular result, that "*even if* we could interpret section 318 as a temporary repeal of the environmental laws at issue in the underlying litigation, then section 318 would amount to an implied partial repeal of the environmental statutes." 914 F.2d at 1317 (Cert. Pet., App. A at 16a) (emphasis added).

Rather than "invoking the doctrine against implied repeals" in order to construe section 318 as violating the Constitution's separation of powers doctrine, as the Solicitor claims, the court of appeals was simply noting that the construction urged by the government was *not only* contrary to the plain language of section 318, but also would require the court to violate the doctrine against implied repeals.

The court of appeals correctly and carefully read th actual language that Congress enacted in sectio 318(b)(6)(A) and properly applied uncontroversial consti tutional principles to that language. There is nothing i these actions of the court of appeals that supports grant ing the Solicitor General's petition for a writ of certiorar in this case.

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for a writ of certiorari.

DATED: This 11th day of May, 1991.

Respectfully submitted,

VICTOR M. SHER
TODD D. TRUE*
SIERRA CLUB LEGAL DEFENSE FUND
216 First Avenue South, Suite 330
Seattle, Washington 98104
(206) 343-7340

Attorneys for Plaintiffs Seattle Audubon Society, et al.

JOHN BONINE
MIKE AXLINE
University of Oregon
School of Law
1101 Kincaid Street, Room 329
Eugene, Oregon 97403
(503) 345-3823

Attorneys for Plaintiffs Oregon Natural Resources Council and Lane County Audubon Society

* Counsel of Record

APPENDICES TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

A *Seattle Audubon Society, et al. v. Evans, et al.*, No. C89-160-WD, Memorandum Decision and Injunction, (W.D. Wash. May 23, 1991)..... 1a

B *Seattle Audubon Society, et al. v. Evans, et al.*, No. C89-160-WD, Order on Motions for Summary Judgment and for Dismissal (W.D. Wash. March 7, 1991)..... 38a

C *Seattle Audubon Society, et al. v. Robertson, et al.*, 9th Cir. No. 90-35774, Opinion, (April 26, 1991). 66a

D *Seattle Audubon Society, et al. v. Evans, et al.*, No. C89-160-WD, Order on SAS' Renewed Motion for Summary Judgment and Permanent Injunction re Six Timber Sales (W.D. Wash. May 24, 1991).... 85a

E *Portland Audubon Society, et al. v. Lujan, et al.*, No. 87-1160-FR, Opinion, (D. Ore. May 8, 1991).....88a

F H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. (1989).....105a

G *Seattle Audubon Society, et al. v. Evans, et al.*, No. C89-160-WD, Order on Motions Heard on December 5, 1990 (W.D. Wash. Dec. 18, 1990).....126a

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al., Plaintiffs, v. JOHN L. EVANS, et al., Defendants. and WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al., Intervenors.	NO. C89-160WD MEMORANDUM DECISION AND INJUNCTION FILED MAY 23 1991

I.

INTRODUCTION

On March 7, 1991, the court entered an order on summary judgment declaring unlawful a proposal of defendants John L. Evans, et al. (collectively the "Forest Service") to log northern spotted owl habitat in national forests located in Washington, Oregon, and Northern California without complying with requirements of the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 *et seq*. Order on Motions for Summary Judgment and for Dismissal (Mar. 7, 1991) (Dkt. # 824). On the basis of that order plaintiffs Seattle Audubon Society, et al. (collectively "SAS") have moved for a permanent injunction prohibiting the sale of logging rights in additional

spotted owl habitat areas until the Forest Service com plies with NFMA and its regulations by adopting sta dards and guidelines to assure that a viable population the species is maintained in the forests. The Forest Se vice proposes a different injunction, one that would pe mit, in the interim, additional sales in owl habitat if the are consistent with the recommendations of the Report the Interagency Scientific Committee to Address the Con servation of the Northern Spotted Owl ("ISC Report" issued in April 1990. Intervenors Washington Contra Loggers Association, et al. (collectively "WCLA") suppo the Forest Service's proposal. The two sides agree that th court should set a date for the Forest Service to adopt plan to assure the owl's viability.

The court granted WCLA's request for an evidentiar hearing on the scope of injunctive relief, and all parties request for prehearing discovery. *See Charlton v. Estate Charlton*, 841 F.2d 988, 989 (9th Cir. 1988). An order issue April 1, 1991, specified the subjects for the hearing. Orde Setting Evidentiary Hearing re Injunctive Relief (Dk # 867). The hearing began on April 30 and ended on Ma 9, 1991. All parties presented evidence, rested their cases and gave oral argument through counsel. The evidenc admitted, the arguments and briefs, and the proposed findings submitted by counsel have been fully consid ered.

II.

HISTORY OF THIS CASE AND RECENT ADMINISTRATIVE PROCEEDINGS

The national forests are managed by the Forest Service under NFMA. Regulations promulgated under that statute provide that

> [f]ish and wildlife shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.

36 C.F.R. § 219.19. A viable population is "one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area." *Id.* To insure viability, habitat must be provided to support at least a minimum number of reproductive individuals. *Id.*

Since not every species can be monitored, "indicator species" are observed as signs of general wildlife viability. *Id.* § 219.19(a)(1). The northern spotted owl is an indicator species.

While having these conservation duties, the Forest Service is also charged with managing these lands to "provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public benefit in an environmentally sound manner." *Id.* § 219.1(a). *See generally* C. Wilkinson & H. Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1 (1985).

In recent years logging and development have steadily reduced wildlife habitat in the Pacific Northwest. At the same time many local mills have experienced log

shortages. The result is an intensified struggle over t
future of the national forests.

In 1989 SAS and WCLA sued the Forest Service
this court, challenging the legality of an administrati
decision adopting standards and guidelines for managi
northern spotted owl habitat in the national forests. T
administrative decision was set out in a Record of De
sion ("ROD") issued on December 8, 1988, and an acco
panying Final Supplement to the Environmental Impa
Statement For an Amendment to the Pacific Northwe
Regional Guide ("FSEIS"). For opposite reasons, the tv
sets of plaintiffs challenged the Forest Service's pl
under NFMA and the National Environmental Policy A
("NEPA"), 42 U.S.C. § 4321 *et seq.*, and their implemer
ing regulations.

The court consolidated the two cases, ordered the
expedited, and set a final hearing date for June 13, 198
On March 24, 1989, the court issued a temporary injun
tion deferring specified timber sales in Washington an
Oregon for what then appeared to be a few weeks unt
the final hearing. Order on Motions for Preliminar
Injunction and for Change of Venue at 2 (Mar. 24, 198
(Dkt. # 97).

On May 11, 1989, the Forest Service moved for a sta
of all proceedings pending completion of a conferenc
process between itself and the Fish and Wildlife Servic
("FWS"). In a separate case, Judge Zilly of this distric
had ruled that the FWS was acting arbitrarily and capr
ciously, and contrary to law, in failing to list the spotte
owl as endangered or threatened under the Endangere
Species Act ("ESA"), 16 U.S.C. § 1531 *et seq. Norther*

Spotted Owl (Strix Occidentalis Caurina) v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988). On April 25, 1989, having reconsidered in response to Judge Zilly's order, the FWS announced its intent to list the owl as "threatened" under the ESA. SAS and WCLA agreed that a stay of the present case was warranted so that the two agencies could consult. The Forest Service proposed a temporary ban on timber sales containing forty or more acres of spotted owl habitat. This was adopted by order of May 26, 1989. Order on Motion for Stay (Dkt. # 173).

The Forest Service said it would present within thirty days interim measures to protect spotted owl habitat during the FWS listing process. It did not do so. Instead it moved on August 24, 1989, for leave to go forward with eleven timber sales that had been deferred. At that point there was no spotted owl management plan in effect. The court on its own motion lifted the stay and ordered an expedited final hearing in these cases. Order Lifting Stay, etc. (Sept. 12, 1989) (Dkt. # 226).

Congress in the meantime was debating legislation which would provide a short-term supply of national forest and Bureau of Land Management ("BLM") timber to mills in Washington and Oregon without having the usual type of agency action subject to judicial review. The final result was section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989) ("section 318"), which became law on October 23, 1989. The Congressional conference committee presented the bill as necessary "because of the failure of the agencies [i.e., the Forest Service and the BLM] to take steps on their own to resolve these matters in a manner

which could have prevented the current situation." H.
Conf. Rep. No. 264, 101st Cong., 1st Sess., *reprinted in* 1
Cong. Rec. H6411 (daily ed. Oct. 2, 1989).

Section 318 included the following provisions, amor
others:

– It directed the Forest Service and the BLM to off
specified quantities of timber for sale in fiscal years 19
and 1990. Subsection (a).

– It contained restrictions on the cutting of "ecolog
cally significant old growth forest stands" except as ne
essary to meet the sales quota, barred logging in certai
"spotted owl habitat areas," and adopted temporaril
(with a few modifications) the standards and guideline
proposed in the Forest Service's December 1988 ROD
Subsections (b)(1), (2) and (3).

– It stated that Congress "determines and directs
that management of the forests for fiscal years 1989-9
according to its provisions "is adequate consideration fo
the purpose of meeting the statutory requirements tha
are the basis for [the present cases and a similar cas
pending in the District of Oregon]." Subsection (b)(6)(A

– It directed the Forest Service to prepare a new
spotted owl plan and have it in place by September 3
1990:

> The Forest Service is directed to review and revise as appropriate the decision adopted in the December 1988 Record of Decision referenced in subsection (b)(6)(A) of this section and shall consider any new information gathered subsequent to the issuance of the Record of Decision, including the interagency guidelines

> for conservation of northern spotted owls developed by the Interagency Scientific Committee to address conservation of the northern spotted owl. This review, and any resulting changes to the December 1988 decision determined to be necessary by the Forest Service are to be completed and in effect not later than September 30, 1990.

Subsection (b)(6)(B).

On November 6, 1989, this court vacated the preliminary injunction because section 318 had become law as to 1989-90 timber sales. The court construed the statute as a temporary amendment of the environmental laws, and therefore rejected SAS's constitutional challenge to subsection (b)(6)(A). Memorandum Decision Re Constitutionality (Nov. 14, 1989) (Dkt. # 278).

An interlocutory appeal was certified under 28 U.S.C. § 1292(b). The court of appeals declined to stay the application of section 318 pending appeal.

Over the next several months the parties proceeded under section 318. SAS brought a series of challenges to timber sales under the standards of the temporary statute. On May 11, 1990, this court entered an order on the first such challenge, enjoining the Cowboy sale in the Umpqua National Forest. (Dkt. # 389). On appeal by the Forest Service, the court of appeals affirmed in an unpublished opinion filed August 27, 1990. *Seattle Audubon Soc'y v. Robertson*, No. 90-35519 (9th Cir. 1990).

Other challenges to 1990 timber sales followed the district court decision on the Cowboy sale. The court enjoined three sales on the basis that the Forest Service had not complied with section 318; the agency withdrew

two other sales after a motion for summary judgment w
filed; and the court found for the Forest Service as to o
sale. (Dkt. ## 459, 608, 677). No party appealed fro
these rulings.

On September 18, 1990, the court of appeals issued
opinion, and on October 30 an amended opinion, findi
the first sentence of section 318 (b)(6)(A) unconstitution
under the separation of powers doctrine. *Seattle Audub*
Soc'y v. Robertson, 914 F.2d 1311 (9th Cir. 1990).

The appeal of the Ninth Circuit concerned the part
section 318 in which Congress "determines and direct
that management of the forests in 1989-90 according
subsections (b)(3) and (b)(5) "is adequate considerati
for the purpose of meeting the statutory requirement
underlying the cases in this district and in Oregon. T
court of appeals ruled that this provision was not
temporary amendment of the environmental laws b
rather an unconstitutional attempt to adjudicate rath
than legislate. The requirements of section 318 were th
held to be in addition to, and not in lieu of, those of t
general environmental statutes. The decision did n
affect the other parts of section 318.

While the above-described events were taking plac
federal administrative agencies took further actio
regarding the spotted owl. The Interagency Scientif
Committee was established in 1989 by agreement of th
Forest Service, the Bureau of Land Management of th
Department of the Interior, the Fish and Wildlife Servic
and the National Park Service. Its mission was "
develop a scientifically credible conservation strategy fo
the northern spotted owl in the United States." Hearin

Exhibit ("Exh.") 1 at 1. On April 2, 1990, the ISC issued its report. *See* 55 Fed. Reg. 40412, 40413; Report of the Interagency Scientific Committee to Address the Conservation of the Northern Spotted Owl, *A Conservation Strategy for the Northern Spotted Owl* (U.S.D.A., *et al.* 1990) (Exh. 1).

In June 1990 the Fish and Wildlife Service, having completed its listing process, listed the owl as a threatened species under the Endangered Species Act. *Determination of Threatened Status for the Northern Spotted Owl*, 55 Fed. Reg. 26114.

The Forest Service did not comply by the deadline of September 30, 1990 – or at all – with section 318's requirement that it adopt a revised plan to ensure the owl's viability.

On September 28, 1990, the Department of Agriculture gave notice that the Forest Service was vacating the December 1988 Record of Decision, and that it would manage timber sales in a manner "not inconsistent with" the ISC Report. 55 Fed. Reg. 40413 (1990). This announcement was made without notice, hearing, environmental impact statement, or other rule-making procedures.

On December 18, 1990, this court enjoined the Forest Service from proceeding with twelve proposed fiscal year 1990 timber sales because the agency had failed to comply with NFMA by having any standards and guidelines for spotted owl viability in place. The order reaffirmed what the court of appeals had already held, i.e., that section 318 did not displace NFMA. Order on Motions Heard December 5, 1990 (Dec. 18, 1990) (Dkt. # 757). Leave was granted to the Forest Service to pursue a newly-raised argument that its duty under NFMA to

maintain the species ended when the listing under E occurred. *Id.*

On February 26, 1991, Judge Zilly ruled in N C88-573Z that the FWS had again failed to comply w the law, stating:

> Upon the record presented, this Court finds the [Fish and Wildlife] Service has failed to discharge its obligations under the endangered Species Act and its own administrative regulations. Specifically, the Service acting on behalf of the Secretary of the Interior, abused its discretion when it determined not to designate critical habitat concurrently with the listing of the northern spotted owl, or to explain any basis for concluding that the critical habitat was not determinable. These actions were arbitrary and capricious, and contrary to law. 5 U.S.C. § 706.

Northern Spotted Owl (Strix Occidentalis Caurina) v. Luja 758 F. Supp. 621, 629 (W.D. Wash. 1991).

The Forest Service's argument in this case that it w relieved of its NFMA duty to plan for the spotted ow viability once the species was listed by the FWS "threatened" was rejected in an order entered March 1991. Order on Motions for Summary Judgment and f Dismissal (Dkt. # 824.) The court found not only that t argument was insupportable, but that "the Forest Servi has understood at all times that its duties under NFM and ESA are concurrent." *Id.* at 15. Accordingly, summa judgment was granted determining that the Forest Se vice's proposal to log spotted owl habitat without co plying with NFMA was unlawful.

WCLA's complaint was dismissed as moot, witho opposition, because the 1988 ROD which it challenge

had been withdrawn. *Id.* at 25. WCLA was then allowed to intervene in the SAS action, and thus remains a party. Order Granting Motion for Leave to Intervene (Apr. 1, 1991) (Dkt. # 868).

III.

AMICUS CURIAE BRIEF OF SISKIYOU COUNTY

On May 16, 1991, a week after the evidentiary hearing ended, the Board of Supervisors and Office of Education of Siskiyou County, California ("Siskiyou County"), sought leave to file a brief *amicus curiae*. Leave was granted, the brief has been filed, and SAS has responded.

Siskiyou County's brief is untimely but has nevertheless been fully considered on the merits. It argues that SAS has no standing to seek relief relating to national forests in Northern California, as distinguished from those in Washington and Oregon; and that, if SAS does have standing, any injunctive relief (even in the form proposed by the Forest Service) should exclude Northern California.

The Forest Service's *Federal Register* notice that the court found to be an unlawful proposal to log owl habitat without compliance with NFMA applied to four national forests in Northern California (in Forest Service Region 5) as well as to thirteen in Oregon and Washington (in Region 6). 55 Fed. Reg. 40412, 40414 (1990). SAS's amended complaint alleges the illegality of the proposed timber sales in the forests of Northern California as well as in those of Washington and Oregon. Second Amended Complaint at ¶¶ 8, 18, 23, and First Claim for Relief at ¶ 1

(Dkt. # 731). The order granting summary judgment ruled that the "agency's failure to date to comply, or begin compliance, with NFMA requirements is arbitrary and capricious, and not in accordance with law." Order of March 7, 1991 at 26 (Dkt. # 824). The proposal to log owl habitat in the four Northern California forests without NFMA compliance was not excepted from the ruling.

As to standing, SAS has challenged an agency action that affects a bird threatened throughout its range. The issue is not limited to specific metes and bounds. As the ISC has noted: "Spotted owls, after all, are oblivious to our political and institutional boundaries." Exh. 1 at 41. SAS's standing as a party "adversely affected or aggrieved" has already been established. See Order of March 7, 1991 at 8 (Dkt. # 824); Declaration of Bonnie Phillips-Howard (Jan. 14, 1991) (Dkt. # 783); *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3185-86 (1990). SAS's motion for leave to file additional declarations showing standing is not necessary, but is granted in order to complete the record.

As to the geographic scope of the injunction, Siskiyou County's argument is that the spotted owl's viability will not be harmed by habitat destruction in Northern California because habitat develops faster there – on the order of fifty or eighty years rather than perhaps a hundred and fifty years farther north. However, the FWS has listed the owl as threatened in Northern California as well as elsewhere. 55 Fed. Reg. 26114. The ISC has identified "areas of special concern" in Northern California, and, even under its recommended plan, estimates only a "low" or "moderate" prospect of viability in three of the area's

four "physiographic provinces" in fifty years. Exh. 1 at 68, 386.

Nothing has been presented that would justify excluding the four Northern California forests, either on biological or economic grounds, from injunctive relief, regardless of whether SAS's or the Forest Service's proposed order is adopted.

IV.

STANDARDS COVERING INJUNCTIVE RELIEF

The standards governing whether and to what extent a permanent injunction should issue are summarized in *Friends of the Earth v. Hall*, 693 F. Supp. 904, 948 (W.D. Wash. 1988):

> In determining whether to issue an injunction where statutory violations have occurred, the court must engage in a two part analysis. *See Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 107 S.Ct. 1396, 1402-04, 94 L.Ed.2d 542 (1987); *Save the Yaak Committee v. Block*, 840 F.2d 714, 722 (9th Cir. 1988). First, the court must determine whether the statute restricts the court's equity jurisdiction, that is whether the statute would either require or preclude issuance of an injunction to remedy a violation. *Village of Gambell*, 107 S.Ct. at 1403; *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982). If the court finds that no such limitation can be found either in the statutory language itself or as a necessary and inescapable inference of the statutory text, then the court must engage in traditional equity balancing to determine the appropriateness of an injunction. *Village of Gambell*, 107 S.Ct. at 1402; *Save the Yaak*, 840 F.2d at 722.

Nothing in NFMA alters the court's equity jurisdiction. The traditional "basis for injunctive relief in the federal courts have always been irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo, supra,* 456 U.S. at 312.

In *Village of Gambell, supra,* 480 U.S. at 545, the Court stated:

> Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

However, the party seeking relief must show not merely a statutory violation, but a probability of injury serious enough to outweigh any adverse effects from the issuance of an injunction. *Id.*

V.

FINDINGS OF FACT

The evidentiary hearing held from April 30 to May 9, 1991, provided a wealth of information. Expert testimony of high quality from biologists, economists, and others was presented by both sides. From the evidence admitted at the hearing the court makes and enters the following findings of fact:

A. Background Findings

1. The fate of the spotted owl has become a battleground largely because the species is a symbol of the remaining old growth forest. As stated in the ISC Report:

> Why all the fuss about the status and welfare of this particular bird? The numbers, distribution, and welfare of spotted owls are widely believed to be inextricably tied to mature and old-growth forests. Such forests have been significantly reduced since 1850 (mostly since 1950) by clearing for agriculture, urban development, natural events such as fire and windstorms, and most significantly, by logging in recent decades. Nearly all old growth has been removed on private lands. Most of the remainder is under the management of the BLM, FS, and NPS on Federal lands. As its habitat has declined, the owl has virtually disappeared from some areas and its numbers are decreasing in others.

Exh. 1 at 7.

2. An old growth forest consists not just of ancient standing trees, but of fallen trees, snags, massive decaying vegetation, and numerous resident plant and animal species, many of which live nowhere else.

3. A great conifer forest originally covered the western parts of Washington, Oregon, and Northern California, from the Cascade and Coast mountains to the sea. Perhaps ten percent of it remains. The spaces protected as parks or wilderness areas are not enough for the survival of the northern spotted owl.

4. The old growth forest sustains a biological community far richer than those of managed forests or tree

farms. As testified by Dr. William Ferrell, a forest ecologist:

> The most significant implication from our new knowledge regarding old-growth forest ecology is that logging these forests destroys not just trees, but a complex, distinctive, and unique ecosystem.

Exh. 12 at 6.

5. The remaining old growth stands are valued also for their effects on climate, air, and migratory fish runs, and for their beauty. A 1984 Forest Service document summed up the controversy:

> There are at least three main reasons cited for maintaining old growth: wildlife and plant habitat, ecosystem diversity, and preservation of aesthetic qualities. Those opposed to the retention of old growth are primarily concerned with economic factors and urge rapid conversion of the existing old growth to managed forests of productive, young age classes.

Pacific N.W. Region, United States Forest Service, United States Dep't of Agric., *Regional Guide for the Pacific Northwest Region* at p. 3-40 (May 1984), attached as Exh. F to Second Declaration of Corrie Yackulic (July 26, 1990) (Dkt. # 445).

6. Through most of the country's history there was little or no logging in the national forests. Intensive logging began with World War II and has accelerated.

7. NFMA was adopted in 1976, after three decades of heavy logging, in the hope of serving both wilderness and industry values. Senator Humphrey of Minnesota, a sponsor of the act, stated:

> The days have ended when the forest may be viewed only as trees and trees viewed only as timber. The soil and the water, the grasses and the shrubs, and fish and the wildlife, and the beauty that is the forest must become integral parts of resource managers' thinking and actions.

122 Cong. Rec. 5619 (daily ed. Mar. 5, 1976).

8. Despite increasing concern over the environment, logging sales by the Forest Service have continued on a large scale. Timber harvests in the national forests in Washington and Oregon ranged from 4.448 billion to 5.082 billion board feet per year in 1985 through 1989, amounting to between 30% and 33% of the total harvest in those states in those years.

9. Some major firms in the Pacific Northwest have extensive private forests and need little or no wood from public sources. Many small mills and logging companies depend in whole or in part on federal timber.

10. Mill owners and loggers, and their employees, especially in small towns, have developed since World War II an expectation that federal timber will be available indefinitely, and a way of life that cannot be duplicated elsewhere.

11. The region's timber industry has been going through fundamental changes. The most important is modernization which increases productivity and reduces the demand for labor (i.e., the jobs available). There have also been recent changes in product demand, in competition from other parts of the country and the world, and in the export of raw logs for processing in the Far East. The painful results for many workers, and their families and

communities, will continue regardless of whether owl habitat in the national forests is protected.

B. Statutory Violations

12. The records of this case and of No. C88-573Z show a remarkable series of violations of the environmental laws. The Forest Service defended its December 1988 ROD persistently for nearly two years. Congress was persuaded in 1989 to adopt most of the ROD standards as a temporary measure in section 318. But in the fall of 1990 the Forest Service admitted that the ROD was inadequate after all – that it would fail to preserve the northern spotted owl. In seeking a stay of proceedings in this court in 1989 the Forest Service announced its intent to adopt temporary guidelines within thirty days. It did not do that within thirty days, or ever. When directed by Congress to have a revised ROD in place by September 30, 1990, the Forest Service did not even attempt to comply. The FWS, in the meantime, acted contrary to law in refusing to list the spotted owl as endangered or threatened. After it finally listed the species as "threatened" following Judge Zilly's order, the FWS again violated the ESA by failing to designate critical habitat as required. Another order had to be issued setting a deadline for the FWS to comply with the law.

13. The reasons for this pattern of behavior were made clear at the evidentiary hearing.

Dr. Eric Forsman, a research wildlife biologist with the Forest Service, testified, in regard to the 1988 ROD and other Forest Service plans for the spotted owl that preceded the ISC Report:

> Q. Were you satisfied at the time with the results of those previous works?
>
> A. No. On all of those plans, I had considerable reservations for a variety of reasons. But primarily because in every instance, there was a considerable – I would emphasize considerable – amount of political pressure to create a plan which was an absolute minimum. That is, which has a very low probability of success and which has a minimum impact on timber harvest.

Hearing Transcript ("Tr.") at 801-02.

George M. Leonard, associate chief of the Forest Service, testified that the agency experts began in early 1990 the work needed to have a revised plan in place by September 30 of that year, as Congress mandated in section 318. But the Secretaries of Agriculture and Interior decided to drop the effort. The public was not told of this decision to ignore what the law required. Mr. Leonard testified:

> THE COURT: When was it in 1990 that you ceased your effort to meet the September 30 deadline of Section 318?
>
> A. When the Secretary of Agriculture and Secretary of Interior began discussion, they appointed an interagency team to look at options to the Interagency Scientific Committee report and whatnot. So, it was – in effect, it was escalated above the Forest Service to the secretarial level.
>
> THE COURT: And when in 1990 did that happen?
>
> A. I think it was about in May, but I don't know precisely the date.

THE COURT: Was any public announcement made at any time before October 1990 to the effect that the Forest Service was not going to publish a revised ROD by the end of September?

A. No, there was not.

THE COURT: Was there any reason that you know of that that wasn't announced?

A. It was the – the Secretary-level committee was working throughout the summer looking at options. And the thought was that they would develop an option and that would be the basis for the announcement.

THE COURT: But they never did?

A. They never did, no.

Tr. at 383-84.

The Forest Service had been expressly directed by Congress in section 318 to consider the ISC recommendations in arriving at the ROD to be issued by September 30, 1990. Dr. Jack Ward Thomas, team leader of the ISC, testified to what happened after his committee's report was issued:

Q. After your report was finalized, was it subject to any additional review?

A. Yes, it was.

Q. What occasioned that subsequent review?

A. After the initial release of the report, there was a political decision made by the administration to appoint a cabinet-level review team that would examine the report, a task force that would examine the report, with the idea of

> seeing if there was some alternative course of action that would be less dramatic economically and socially.

Tr. at 985-86.

14. Had the Forest Service done what Congress directed it to do – adopt a lawful plan by last fall – this case would have ended some time ago.

15. More is involved here than a simple failure by an agency to comply with its governing statute. The most recent violation of NFMA exemplifies a deliberate and systematic refusal by the Forest Service and the FWS to comply with the laws protecting wildlife. This is not the doing of the scientists, foresters, rangers, and others at the working levels of these agencies. It reflects decisions made by higher authorities in the executive branch of government.

C. Time Needed for Forest Service to Comply with NFMA

16. The Forest Service seeks an allowance of fifteen more months, or until July 31, 1992, to prepare a new ROD and environmental impact statement. Another month would have to pass before the ROD could take effect. The agency thus proposes to accomplish by August 31, 1992, the step that Congress directed it to complete by September 30, 1990. The sixteen months, according to the testimony of Mr. Leonard, "would include several months for analyzing comments and preparing the final document." Tr. at 368. But the agency declines to make a firm prediction about even this extended timetable. Mr. Leonard testified that two or three years might go by

before his agency reached a decision, depending on future developments such as FWS's promulgation of a species recovery plan. *See* Tr. at 370-71, 374.

17. Further delays of this magnitude are neither necessary nor tolerable.

18. In adopting section 318, which became law on October 23, 1989, Congress directed the Forest Service to have a revised spotted owl plan in effect eleven months later. Subsection (b)(6)(B). In doing so Congress made clear that it expected full compliance. Representative AuCoin, a supporter of the legislation, stated:

> I want to put the Forest Service on notice right now, Madam Speaker, that we expect the Forest Service to complete, to adopt, and to implement new forest plans in the coming year. Thirteen years have passed since the enactment of the National Forest Management Act; 4 years have passed since the deadline for completion of initial forest plans. We should not have to be here on the floor today to recover this agency's mistakes, but yet we are here.

135 Cong. Rec. H6506 (daily ed. Oct. 3, 1989).

19. According to Mr. Leonard's testimony, the Forest Service began work in early 1990 to met the congressional deadline. It had been directed in section 318 to consider the forthcoming ISC Report. The report came out in April. Work was then stopped by a decision made at the cabinet level. Tr. at 381-84.

20. The Forest Service now has advantages it lacked in early 1990. Much of the research and analysis had been done. The ISC Report, a thorough treatment, has been in existence for more than a year. The agency also has the

benefit of an opinion letter from the FWS dated April 10, 1991, commenting at length on the ISC strategy and giving recommendations. Exh. A-7.

21. With the knowledge at hand, there is no reason for the Forest Service to fail to develop quickly a plan to ensure the viability of the spotted owl in the national forests. Coordination with the FWS need not be an obstacle; the agencies have coordinated their efforts on other species, and can on this one. The job could be completed in less time than was allowed by Congress in 1989 when it adopted section 318. However, equal time of eleven months will be afforded. The time will run from April 1, 1991, when the court ordered the agency to proceed diligently in compliance with NFMA. (Dkt. # 867). A new ROD with accompanying EIS will thus be due on February 3, 1992, to take effect on March 5, 1992. The net result is that the agency has a seventeen-month extension to complete the job that Congress mandated be done by September 30, 1990.

D. Probability of Irreparable Harm

22. The northern spotted owl is now threatened with extinction. The ISC Report states:

> We have concluded that the owl is imperiled over significant portions of its range because of continuing losses of habitat from logging and natural disturbances. Current management strategies are inadequate to ensure its viability. Moreover, in some portions of the owl's range, few options for managing habitat remain open, and available alternatives are steadily declining throughout the bird's range.

> For these reasons, delay in implementing a conservation strategy cannot be justified on the basis of inadequate knowledge.

Exh. 1 at 1.

The FWS has found that the owl is threatened *throughout* its range. 55 Fed. Reg. 26114.

23. The population of northern spotted owls continues to decline. "We're going to have to arrest that decline and reverse it," as Dr. Thomas testified. Tr. at 1007.

24. "Spotted owl habitat," also called "suitable habitat," is defined as follows by FWS:

> Suitable owl habitat has moderate to high canopy closure (60 to 80 percent); a multi-layered, multi-species canopy dominated by large (> 30 inches in diameter at breast height (dbh) overstory trees; a high incidence of large trees with various deformities e.g., large cavities, broken tops, dwarf-mistletoe infections, and other evidence of decadence); numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly.

55 Fed. Reg. 26114, 26116 (1990).

The same definition is used in the ISC Report (Exh. 1 at 164), and is adopted for purposes of this order.

25. The Forest Service estimates that an additional 66,000 acres of spotted owl habitat would be destroyed if logging went forward to the extent permitted by the ISC Report over the next sixteen months. That would be in addition to about 400,000 acres of habitat logged in the seven years since the agency began preparing these

guidelines, all without having a lawful plan or EIS for the owl's management in place.

26. The ISC Report recommends standards and guidelines aimed at assuring the owl's long-term viability. The strategy contains seven major components: four categories of habitat conservation areas ("HCAs), two different spacing requirements between HCAs, and the 50:11:40 rule. Exh. 1 at 28-29, 283-343 (Appendices O, P & Q).

27. No timber management activities may take place in HCAs. Category 1 HCAs are designed to hold twenty or more pairs of spotted owls. Exh. 1 at 28, 315 (Appendix Q). Category 2 HCAs are designed to hold between two and nineteen pairs. *Id.* Category 3 HCAs are placed around single pairs of owls in areas of special concern identified by the ISC. *Id.* at 332 (Appendix Q). Category 4 HCAs are designed for the retention of eighty acres of suitable habitat around core areas to provide for connectivity in the forest matrix and future nest sites. *Id.* at 29, 315.

28. Category 1 HCAs can be no more than twelve miles, Category 2 HCAs no more than seven miles, from the nearest neighbor. Exh. 1 at 26 and 320.

29. The ISC's standards and guidelines also specify the type of habitat to be found in the intervening landscape, via the 50:11:40 rule. That rule requires that at least fifty percent of the forested landscape outside HCAs be maintained in stands of timber with an average diameter at breast height of eleven inches or greater, and at least 40% canopy closure. Exh. 1 at 29, 309-10.

30. The ISC's strategy is map-based. Exh. 1 at 29. Using the standards and guidelines outlined above, the ISC has delineated the HCAs on the ground. *Id.* Maps showing the delineation of Category 1 and 2 HCAs accompany the report. Exh. 1, Maps.

31. The ISC Report has been described by experts on both sides as the first scientifically respectable proposal regarding spotted owl conservation to come out of the executive branch. However:

(a) To have a chance of success, the strategy would have to be adopted and followed by the agencies concerned. So far it has not been adopted by any agency. The BLM, which manages extensive old growth forests, has declined to implement the strategy in full. This causes concern even to the experts relied upon by the Forest Service. *See, e.g.*, the testimony of Dr. Mark Boyce at Tr. 968-69. Even temporarily, while a conservation plan is being adopted, the BLM will not comply in full with the 50:11:40 rule. On this score FWS has stated in its April 11, 1991, opinion letter:

> While the Forest Service has agreed to implement both of the major components of the ISC Conservation Strategy, (i.e., establishment and protection of habitat conservation areas and management of areas outside HCAs by the 50-11-40 rule (Thomas et al. 1990a)), the Bureau of Land Management (Bureau) has not made a similar commitment. Specifically, the Bureau has not agreed to fully manage the forest matrix to comply with the 50-11-40 rule. The Bureau's failure to fully implement the strategy may have significant consequences for the spotted owl because of the strategic location of Bureau lands between provinces and within areas of concern,

> and because much of their land lies within checkerboard ownership. The expected success of the ISC Conservation Strategy was based on full implementation of the recommendations on all Federal lands, beginning with the FY 1991 timber sale program.

Exh. A-7 at 14.

There is nothing in the record to refute these concerns over the BLM's position. The testimony of Joseph Lint, a BLM Wildlife biologist, relied upon by the Forest Service and WCLA, does not contain any opinion on the subject.

(b) The ISC proposal has not been put to the test of pubic comment and hearings.

(c) The ISC strategy may or may not prove to be adequate. While it is endorsed by well-qualified scientists, it is criticized by others, equally well-qualified, as over-optimistic and risky. The Fish and Wildlife Service has stated that it "may not represent a permanent, long-term solution for conservation or recovery of the spotted owl, nor assure compliance with the [ESA] and National Forest Management Act." Exh. A-7 at 15.

(d) The ISC Report calls for diligent monitoring to sample the results once the program begins:

> A comprehensive monitoring scheme that covers all land ownerships should be developed. . . . [W]e believe that developing and instituting a fully coordinated program of management, monitoring, research, and development, which operates across all of the landscape

> that makes up owl habitat, is both essential and overdue.

Exh. 1 at 41.

No monitoring scheme exists, although members of the ISC expected one to be in place by now.

32. To log tens of thousands of additional acres of spotted owl habitat before a plan is adopted would foreclose options that might later prove to have been necessary. The FWS has stated:

> We share the ISC's concern that few options remain open for managing spotted owl habitat and that available management alternatives are steadily declining throughout the range (Thomas et al. 1990a). Adoption of the conservation strategy on an interim basis further reduces alternative conservation options by concentrating timber harvest in spotted owl habitat outside the HCAs, fragmenting remaining contiguous blocks of habitat which lay outside HCAs, and impacting the productivity of spotted owl pairs in the forest matrix by further reducing the amount of suitable habitat within their home ranges. Until a permanent recovery plan is developed and implemented, future management options should be preserved by providing protection for spotted owl pairs and resident singles both in and out of HCAs, and by reserving the remaining contiguous blocks of spotted owl habitat.

Exh. A-7, p. 14.

33. Mr. Leonard of the Forest Service has testified that the agency will consider the alternative of preserving the remaining spotted owl habitat in the national forests.

Tr. at 385-86. That alternative would be lost if extensive logging of habitat were to go forward now.

34. A review of proposed sales by the FWS would not be a substitute for compliance with NFMA. The Forest Service is required by law to manage the lands entrusted to it so as to maintain viable populations of native vertebrate species, regardless of whether they are listed by another agency. *See* Order on Motions for Summary Judgment and for Dismissal at 15-20 (Mar. 7, 1991) (Dkt. # 824). An FWS designation of "critical habitat" does not imply that logging will be excluded; the designation "does not prescribe any particular management regime in the areas so designated," and permitted activities may "include timber harvests." *See* 56 Fed. Reg. 20816, 20817-18, 20820 (1991). FWS still has no spotted owl recovery plan. Its recommendation of "prudent measures" to the Forest Service may simplify the work, but does not relieve the latter agency of its stewardship of the national forests.

35. The logging of 66,000 acres of owl habitat, in the absence of a conservation plan, would itself constitute a form of irreparable harm. Old growth forests are lost for generations. No amount of money can replace the environmental loss.

36. While the agency's proposal would involve logging an estimated one percent of the remaining habitat, the experts agree that cumulative loss of habitat is what has put the owl in danger of extinction. There is a substantial risk that logging another 66,000 acres, before a

plan is adopted, would push the species past a population threshold from which it could not recover. Dr. Gordon Orians, an expert in avian populations and ecology, has testified:

> Q. Can you summarize why you recommend that there be no further logging while the agency determines its new management plan?
>
> A. I recommend a cessation of logging of owl habitat in the short run because I think the risk that the population crosses a very significant viability threshold is increased significantly by continued loss of its habitat. This will reduce the options to maintain viability in the future.
>
> * * *
>
> Q. What does "significant probability" mean here?
>
> A. "Significant probability" means, in this context, that given the threats that exist on the owl now, by implementing the plan in a manner that continues to lose significant amounts of habitat during a transition period poses very significant risks to the spotted owl population; that is, a reasonably high probability that it would cross such a threshold line.

Tr. at 85, 141.

The Forest Service may decide that Dr. Orians is mistaken, but it has not done so yet.

E. Economic and Social Consequences

37. The testimony on economic impact assumed a sixteen-month injunction. The Forest Service would sell between 1.734 and 1.423 billion board feet of timber in fiscal year 1991 (which ends September 30, 1991) from the

seventeen "spotted owl" national forests, if permitted to sell timber consistent with the ISC Report. On the same basis it would sell in fiscal year 1992 between 1.9 and 1.453 billion board feet. The sale levels if owl habitat were protected in the interim would be about .394 billion board feet in 1991 and .415 billion in 1992. The difference between protecting and not protecting habitat until the Forest Service develops its plan would thus be between 1.03 and 1.34 billion board feet during fiscal year 1991 and between 1.04 and 1.59 billion board feet during fiscal year 1992.

38. The injunction would not prohibit the logging of existing sales, but rather the sale of additional logging rights in owl habitat areas while the Forest Service was in the process of adopting a plan. Thus, timber sale reductions do not translate directly into harvest reductions.

39. The estimate used by all parties is that as of February 28, 1991, there were 4.778 billion board feet of uncut timber under contract in the "spotted owl" forests. That figure includes four 1990 sales, aggregating 14.1 million board feet, which are subject to a revived legal challenge as the result of a recent court of appeals decision holding that section 318's fifteen-day statute of limitations was equitably tolled. *Seattle Audubon Soc'y v. Robertson*, No. 90-35774 (9th Cir. 1991). SAS and the other environmental organizations represented by its counsel have waived in open court any challenge to the remaining 1990 sales (except for two which are not yet awarded). Tr. at 24. Subtracting the 14.1 million leaves about 4.764 billion board feet under contract and free of legal challenge. When added to the amount of timber the Forest Service would sell while protecting owl habitat,

that supply of timber would last about nineteen months if logging proceeded at the rate experienced during fiscal year 1990. The most credible current forecasts suggest that demand for wood products during 1991 and 1992 will be at or below that of 1990.

40. Any after-effects of an injunction would be reduced by the fact that its period would be six months shorter than that requested by the agency and assumed by the economists who testified.

41. Additional timber supplies from private lands can reasonably be expected to enter the market if the price of timber stumpage increases, as it probably will do if Forest Service sales decline. In addition, some timber now exported will probably be diverted to the domestic market.

42. To the extent that Pacific Northwest mills have had supply shortages, the problem has been exacerbated by the export of raw logs. About thirty percent of the timber harvested in Washington and eleven percent of that harvested in Oregon is exported. Exports from private lands in Washington, Oregon, and Northern California during 1989 totalled 3.637 billion board feet. The exported logs produce no mill jobs or added value in the United States. A ban on exports would not automatically shift every raw log to domestic buyers, but would provide a major source of additional supply. It is true, as the Forest Service and WCLA point out, that transportation costs from Western Washington to Southern Oregon exceed those for logs produced in the immediate vicinity.

They are nevertheless lower than the costs of transportation to Japan, China, or Korea. An export ban would also have the effect of moderating log prices generally.

43. While some mills may experience log shortages during the period of an injunction, that would occur to some degree regardless of whether owl habitat is protected, and there is no way of assuring that the mills most in need of logs would get them if the Forest Service proposal were adopted. National forest timber sales must be awarded on competitive bids. 36 C.F.R. 223.100.

44. Over the past decade many timber jobs have been lost and mills closed in the Pacific Northwest. The main reasons have been modernization of physical plants, changes in product demand, and competition from elsewhere. Supply shortages have also played a part. Those least able to adapt and modernize, and those who have not gained alternative supplies, have been hardest hit by the changes. By and large, the companies with major capital resources and private timber supplies have done well; many of the smaller firms have had trouble.

45. Job losses in the wood products industry will continue regardless of whether the northern spotted owl is protected. A credible estimate is that over the next twenty years more than 30,000 jobs will be lost to worker-productivity increases alone.

46. A social cost is paid whenever an economic transformation of this nature takes place, all the more so when a largely rural industry loses sizeable numbers of jobs. Today, however, in contrast to earlier recession periods, states offer programs for dislocated workers that ease and facilitate the necessary adjustments.

47. Counties in timber-dependent communities derive revenues from the harvest of national forest timber. Federal law presently guarantees counties at least 90% of the average of receipts obtained between 1988 and 1990, unless timber harvests during fiscal 1991 fall by 78%, which no evidence suggests would occur. Revenues from this source will decline later if harvests decline. These public entities, however, do not expect to obtain revenues from sales made in violation of law.

48. The timber industry no longer drives the Pacific Northwest's economy. In Oregon, for example, the level of employment in lumber and wood products declined by seventeen percent between 1979 and 1989. In the same period, Oregon's total employment increased by twenty-three percent.

49. The wood products industry now employees about four percent of all workers in Western Oregon, two percent in Western Washington, and six percent in Northern California. Even if some jobs in wood products were affected by protecting owl habitat in the short term, any effect on the regional economy probably would be small.

50. The remaining wilderness contributes to the desirability of this region as a site for new industries and their employees. The resulting economic gains, while hard to measure, are genuine and substantial. The FWS has recently noted that preservation of old growth brings economic benefits and amenities "of extremely high value." 56 Fed. Reg. 20816, 20822 (May 6, 1991). Exh. A-63.

VI.

THE PUBLIC INTEREST AND THE BALANCE OF EQUITIES

The court must weigh and consider the public interest in deciding whether to issue an injunction in an environmental case. *See, e.g., Sierra Club v. Penfold,* 857 F.2d 1307, 1318 (9th Cir. 1988); *Northern Alaska Environmental Center v. Hodel,* 803 F.2d 466, 471 (9th Cir. 1986). It must also consider the balance of equities among the parties. *Village of Gambell,* 480 U.S. at 545.

The problem here has not been any shortcoming in the laws, but simply a refusal of administrative agencies to comply with them. See Findings 12 through 15, above. This invokes a public interest of the highest order: the interest in having government officials act in accordance with law. *See Olmstead v. United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

The public also "has a manifest interest in the preservation of old growth trees." *Pilchuck Audubon Soc'y v. MacWilliams,* 19 ELR 20526, 20529 (W.D. Wash. 1988).

This is not the usual situation in which the court reviews an administrative decision and, in doing so, gives deference to agency expertise. *See Northwest Coalition for Alternatives to Pesticides v. Lyng,* 844 F.2d 588, 590-91 (9th Cir. 1988). The Forest Service here has not taken the necessary steps to make a decision in the first place – yet it seeks to take action with major environmental impact.

The loss of an additional 66,000 acres of spotted owl habitat, without a conservation plan being in place, and

with no agency having committed itself to the ISC strategy, would constitute irreparable harm, and would risk pushing the species beyond a threshold from which it could not recover.

Any reduction in federal timber sales will have adverse effects on some timber industry firms and their employees, and a suspension of owl habitat sales in the national forests is no exception. But while the loss of old growth is permanent, the economic effects of an injunction are temporary and can be minimized in many ways. *See* Findings 37 through 50, above.

To bypass the environmental laws, either briefly or permanently, would not fend off the changes transforming the timber industry. The argument that the mightiest economy on earth cannot afford to preserve old growth forests for a short time, while it reaches an overdue decision on how to manage them, is not convincing today. It would be even less so a year or a century from now.

For the reasons stated, the public interest and the balance of equities require the issuance of an injunction directing the Forest Service to comply with the requirements of NFMA by March 5, 1992, and preventing it from selling additional logging rights in spotted owl habitat until it complies with the law.

VII.

INJUNCTION

On the basis of the foregoing findings and conclusions, it is ordered and adjudged that:

A. The Forest Service is enjoined to proceed diligently in compliance with NFMA, as required by the order entered on April 1, 1991 (Dkt. # 867), and to submit to the court and have in effect by March 5, 1992, revised standards and guidelines to ensure the northern spotted owl's viability, together with an environmental impact statement, as required by NFMA and its implementing regulations. The agency is directed to submit to the court by June 15, 1991, a timetable for completion of the steps to meet this schedule.

B. The Forest Service is further enjoined from auctioning or awarding any additional timber sales from Forest Service Regions Five and Six that would log suitable habitat for the northern spotted owl, as defined above, until the said standards and guidelines are adopted and in effect.

The clerk is directed to send copies of this order to all counsel of record.

Dated: May 23, 1991.

/s/ William L. Dwyer
William L. Dwyer
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al., Plaintiffs, v. F. DALE ROBERTSON, et al., Defendants.	NO. C89-160WD CONSOLIDATED WITH NO. C89-99(T)WD
WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al., Plaintiffs, v. F. DALE ROBERTSON, et al., Defendants.	ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND FOR DISMISSAL FILED MAR 7 1991

I.

INTRODUCTION

The history of these cases, and of the earlier rulings made by this court and the court of appeals, is summarized in the Order on Motions Heard December 5, 1990 (Dkt. # 757). Sections I and II of that order, at pages 1-9, are incorporated by reference in this introduction.

The December 18 order ruled that twelve fiscal year 1990 timber sales advertised by the Forest Service could not be awarded because the agency had failed to comply

with applicable laws. In particular, the agency had failed to have in place "plans for units of the national forest system" that "incorporate the standards and guidelines" required by 16 U.S.C. § 1604(c), one of which requires the agency to assure the viability of all native vertebrate species, including the northern spotted owl. 16 U.S.C. § 1604(g) and 36 C.F.C. § 219.19. The order enjoined the Forest Service from awarding the sales "until such time as it shows compliance with the environmental statutes." *Id.* at 17. The agency was given leave to argue a newly-raised contention that its alleged compliance with the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, would eliminate any duties in regard to the owl under the NFMA. That argument has been made and is rejected in today's order. On February 15, 1991, the Forest Service appealed to the court of appeals from the December 18 order. To expedite matters, this court recommends that any appeal from today's order be consolidated with the appeal taken on February 15.

The following motions are now ready for decision:

1. The motion of plaintiffs Seattle Audubon Society, et al. ("SAS"), for summary judgment declaring that the proposal of defendants F. Dale Robertson, et al. ("Forest Service"), to log northern spotted owl habitat without complying with certain statutes is contrary to law. The statutes claimed to be applicable are the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 *et seq.*; the National Environmental Policy Act ("NEPA"), 42 U.S.C § 4321 *et seq.*; and the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. § 703 *et seq.* SAS seeks an injunction requiring the Forest Service to adopt standards and guidelines to insure the spotted owl's viability pursuant

to NFMA; to prepare environmental impact statements pursuant to NEPA; and to obtain permits required by MBTA.

2. The Forest Service's cross-motion for summary judgment on essentially the same issues. This motion seeks a ruling that the notice published in the *Federal Register* on October 3, 1990, advising that the agency was vacating the December 1988 Record of Decision ("ROD") initially challenged herein, and stating that it would "conduct timber management activities in a manner not inconsistent with the Interagency Scientific Committee recommendations," constituted lawful agency action. The Forest Service contends that action taken under the notice will not violate NFMA, NEPA, or MBTA, and seeks dismissal of SAS's claims to the contrary. The agency seeks to vacate the order of December 18, 1990, *supra*, enjoining it from awarding twelve specified sales until it complied with the applicable environmental statutes.

3. SAS's motion for summary judgment determining that the December 1988 ROD violates the environmental statutes, and the Forest Service's cross-motions asserting that no case or controversy on that subject exists because the ROD has been withdrawn, and seeking dismissal of SAS's claims involving the ROD on that basis.

4. The Forest Service's motion to dismiss the complaint of plaintiffs Washington Contract Loggers Association, et al. ("WCLA"), because that complaint challenged only the now-withdrawn ROD and no case or controversy now exists.

5. SAS's motion for summary judgment under NFMA, NEPA, and MBTA as to five sales that were

enjoined earlier under the temporary standards set by Congress for fiscal year 1990, or were withdrawn by the Forest Service after a challenge was filed, and are not currently proposed. The temporary standards are found in section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989) ("section 318"). The Forest Service seeks a ruling that the question as to the five sales is moot.

Following oral argument on these motions on January 17, 1991, the parties were granted leave to file additional materials, and the record was completed with supplemental filings on February 11, 1991.

On February 26, 1991, the Honorable Thomas S. Zilly of this court ruled, in a separate case, that the United States Fish and Wildlife Service ("FWS") has acted contrary to law in failing to designate critical habitat for the northern spotted owl as a threatened species under the ESA. Order Granting Plaintiffs' Motion for Summary Judgment and Motion to Compel Designation of Critical Habitat, *Northern Spotted Owl (Strix Occidentalis Caurina), et al., v. Lujan, et al.* (No. C88-573Z W.D. Wash.) (Feb. 26, 1991) (Dkt. # 126). The court in that case ordered the FWS to file by March 15, 1991, a written plan for completing its critical habitat review, and to publish its proposed plan within forty-five days thereafter. *Id.* at 20.

II.

STANDARD OF REVIEW

There are no genuine issues of material fact for trial as to the motions listed above, and they may be decided on summary judgment. Fed. R. Civ. P. 56.

The court in reviewing a challenged administrative action determines whether the action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or was taken without observance of procedures required by law. *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 980-81 (9th Cir. 1985); 5 U.S.C. § 706. The standard is narrow and presumes the agency action is valid, *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976), but does not shield agency action from a "thorough, probing, in-depth review." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

The focal point for judicial review is the administrative record in existence, not a new record made initially in the reviewing court. *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1159 (9th Cir. 1980). The court may, however, consider evidence outside the administrative record for certain limited purposes, e.g., to explain the agency's action or to determine whether its course of inquiry was insufficient or inadequate. *Love v. Thomas*, 858 F.2d 1347, 1356 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989); *Animal Defense Counsel v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988).

III.

THE FOREST SERVICE'S DUTIES UNDER NFMA ARE NOT CANCELLED AS TO SPECIES LISTED UNDER ESA

A. Statement of the Issue

The amended court of appeals decision of October 30, 1990, made clear that the general environmental statutes continue to apply to the Forest Service in its planning and awarding of timber sales in the national forests. *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990). Congress may amend those statutes, but it failed to do so when it adopted section 318 as a temporary measure. The requirements of section 318 are in addition to those already in existence. *Id.* at 1316. In the present motions the Forest Service argues that its duties under NFMA and NEPA, insofar as they involve the spotted owl, are cancelled by another statute. In this instance the agency relies on EPA. The notice published by the Forest Service in the *Federal Register* on October 3, 1990, stated in part:

> On April 2, 1990, the Interagency Scientific Committee released its findings and recommendations in a report entitled "A Conservation Strategy for the Northern Spotted Owl." On June 22, 1990, the Fish and Wildlife Service listed the northern spotted owl under the Endangered Species Act as threatened throughout its range, 55 FR 26114.
>
> * * *
>
> Listing of a species under the Endangered Species Act constitutes a determination by the Fish and Wildlife Service that the species is in danger of extinction and therefore does not have a viable population, as defined at 36 CFR 219.19,

> in the area in which it is listed. As a consequence of the listing of the northern spotted owl, the Forest Service's regulatory authority for planning and management of the habitat of the northern spotted owl is superseded by the requirements of the Endangered Species Act. . . .
>
> Taking consideration of the statutory requirements and scientific analysis referenced above, the 1988 Record of Decision, and all direction therein, is vacated. The SOHAs established in compliance with the Record of Decision direction are, therefore, also vacated, as well as any previous decisions concerning management of spotted owl habitat. As a result, all final Forest Plans are therefore amended to incorporate this vacation and return the SOHAs established in compliance with the 1988 Record of Decision to the land classifications of the adjacent lands as established in the respective final Forest Plans. Pending enactment of new legislation, any applicable action by the Endangered Species committee, adoption of a recovery plan by the Fish and Wildlife Service, or the results of further biological consultation between the Forest Service and the Fish and Wildlife Service, the Forest Service will conduct timber management activities in a manner not inconsistent with the Interagency Scientific committee recommendations, which are more than sufficient to assure compliance with the Endangered Species Act during this interim period.

55 Fed. Reg. 40412, 40413.

The Forest Service argues that this notice commits it to comply with EPA, and that EPA, once a species is listed, relieves it of its duties under NFMA and other statutes. SAS argues that the Forest Service's duties under the statutes are concurrent, and that the agency has failed

to meet its obligations under NFMA and NEPA as to timber sales proposed in accordance with the notice. These claims are raised in SAS's second amended complaint. *See* Second Amended Complaint for Declaratory and Injunctive Relief, First and Fourth Claims (Nov. 29, 1990) (Dkt. # 731).

B. Reviewable Administrative Action

SAS seeks review of the Forest Service's action in publishing the notice withdrawing the ROD and committing itself to "conduct timber management activities in a manner not inconsistent with the Interagency Scientific Committee recommendations."

The Administrative Procedure Act ("APA") provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702. This provision contains two requirements. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3185 (1990). The person seeking review must show, first, an agency action; second, that he or she has suffered legal wrong because of the challenged action, or is adversely affected or aggrieved by it within the meaning of a relevant statute. *Id.* at 3186. That SAS is "adversely affected or aggrieved" by a proposal to log spotted owl habitat without compliance with NFMA standards and procedures, *see* Declaration of Bonnie Phillips-Howard (Jan. 14, 1991) (Dkt. # 783), is not contested. The Forest Service

argues, however, that "agency action" is lacking, and that accordingly there is nothing to review.

Agency action is defined as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). When review is sought under the general review provisions of the APA, the action in question must be "final agency action." *Lujan*, 110 S. Ct. at 3185.

The Forest Service's action here was final in that it proposed to award timber sales – "conduct timber management activities" – pursuant to the *Federal Register* notice and without adopting a spotted owl management plan. Nothing further was to be done except the making of individual sales. It would make little sense, and would waste the resources of all parties, to require a separate challenge to each sale if the agency had omitted a step required by law to make any sales in spotted owl habitat areas. The action was thus "final" for purposes of judicial review. *Lujan*, relied upon by the Forest Service, is not to the contrary. The Court there said:

> If there is in fact some specific order or regulation, applying some particular measure across-the-board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review . . . it can of course be challenged under the APA by a person adversely affected . . . .

Lujan, 110 S. Ct. at 3189 n.2. The agency action here corresponds to the description in *Lujan*. *See also Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1169-70

(6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *National Helium Corp. v. Morton*, 455 F.2d 650, 654 (10th Cir. 1971).

C. Discussion

The Forest Service's argument that its duties under EPA displace those imposed upon it by NFMA and NEPA is refuted by the statutes themselves and the agency's own established practices in applying them.

ESA provides "a program for the conservation of . . . endangered species and threatened species." 16 U.S.C. § 1531(b). The program is activated when FWS lists a species of wildlife as endangered or threatened. An endangered species is one "which is in danger of extinction throughout all or a significant portion of its range . . . . " 16 U.S.C. § 1532(6). A threatened species is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

ESA requires each federal agency to

> insure that any action authorized, funded, or carried out [by it] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or modification of habitat of such species . . . .

Id. § 1536(a)(2). If an agency proposes an action that may affect an endangered or threatened species it must, before proceeding further, consult with FWS. *Id.* § 1536(a), (b). Once the agency has initiated consultation, it may not make "any irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the

formulation or implementation of any reasonable and prudent alternative measures . . . . " *Id.* § 1536(d).

The result of the consultation is a "biological opinion" from FWS – a document which advises whether the proposal complies with ESA. *Id.* § 1536(b)(3), (4). In the biological opinion, FWS must decide if the proposed action jeopardizes the species' continued existence or adversely modifies or destroys critical habitat. *Id.* § 1536(b)(3)(A). If it does, the opinion must recommend prudent and reasonable alternatives to avoid those consequences. *Id.*

The Forest Service argues that it is complying with the ESA as to the spotted owl. The argument was advanced before the February 26, 1991, ruling in No. C88-573Z, where the court held:

> Upon the record presented, this Court finds the [Fish and Wildlife] Service has failed to discharge its obligations under the Endangered Species Act and its own administrative regulations. Specifically, the Service acting on behalf of the Secretary of the Interior, abused its discretion when it determined not to designate critical habitat concurrently with the listing of the northern spotted owl, or to explain any basis for concluding that the critical habitat was not determinable. These actions were arbitrary and capricious, and contrary to law. 5 U.S.C. § 706.

Order Granting Plaintiffs' Motion for Summary Judgment at 19, *Northern Spotted Owl (Strix Occidentalis Caurina), et al., v. Lujan, et al.* (No. C88-573Z W.D. Wash.) (Feb. 26, 1991) (Dkt. # 126).

In view of that ruling, the Forest Service is arguing, in effect, that its duties are discharged by complying with

the directives of another agency which itself is failing to meet its statutory duty. But the argument that NFMA and NEPA cease to apply once a species has been listed cannot be sustained in any event.

NFMA, passed three years after ESA, directs the Secretary of Agriculture to promulgate regulations to provide for diversity of plant and animal communities in order to meet overall multiple-use objectives. 16 U.S.C. § 1604(g)(3)(B). To that end, a regional guide is required for each administratively designated Forest Service region to provide standards and guidelines for forest planning. 36 C.F.R. 219.8(a). Regional foresters establish policy and approve all forest plans in their regions. *Id.* § 219.10(a). Forest supervisors prepare and implement forest plans. *Id.* § 219.10(a)(2). A minimum requirement is that

> [f]ish and wildlife shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.

§§ 219.13, 219.19. A viable population is "one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area." *Id.* § 219.19. To insure viability, habitat must be provided to support at least a minimum number of reproductive individuals. *Id.*

The duty to maintain viable populations of existing vertebrate species requires planning for the entire biological community – not for one species alone. It is distinct from the duty, under the ESA, to save a listed species from extinction.

Under NFMA, species whose population changes are believed to reflect the impact of logging and other activities, and to measure wildlife viability, are selected as "indicator species." *Id.* § 219.19(a)(1). The northern spotted owl is an indicator species.

The Forest Service argues that while NFMA requires it to "maintain viable populations," ESA's purpose is to return threatened or endangered species to the point where their populations *are* viable. The agency thus contends that NFMA applies only to non-viable species, and that once a species becomes threatened or endangered ESA alone defines the Forest Service's duties.

However, NFMA was enacted three years later than ESA, and nothing in its language or legislative history suggests that Congress intended to exclude endangered or threatened species from NFMA's procedural and substantive requirements. The regulations under NFMA explicitly address endangered and threatened species. They do not suggest that ESA alone governs, or imply any conflict between the two statutes.

The record shows that the Forest Service has understood at all times that NFMA continues to apply after a species is listed under ESA. The regulations under NFMA impose the following requirement, among others, on management planners:

> Habitat determined to be *critical for threatened and endangered species* shall be identified, and measures shall be prescribed to prevent the destruction or adverse modification of such habitat. Objectives shall be determined *for threatened and endangered species* that shall provide for, where possible, their removal from listing as

> threatened and endangered species through appropriate conservation measures, including the designation of special areas to meet the protection and management needs of such species.

Id. § 219.19(a)(7) (emphasis added).

An illustration of the agency's recognition that NFMA and ESA apply concurrently is provided by its recent decision to proceed with the Erika timber sale in the Gifford Pinchot National Forest. The relevant documents were signed in December 1990 and January 1991. The decision notice states that the Erika sale is "not inconsistent with the Interagency Scientific Committee's recommendations" although "suitable spotted owl habitat will be harvested in this project." The finding of no significant impact states that the spotted owl "will be protected according to current guidelines," although none are identified beyond the *Federal Register* notice. The environmental assessment analyzes the spotted owl both as a threatened species and a management indicator species, and notes that "one forest objective is to maintain viable populations of these [indicator] species." *See* Declaration of Todd D. True in Support of SAS' Motion for Leave to File Supplemental Exhibit, Exh. A (Feb. 4, 1991) (Dkt. # 811). These documents plainly recognize both that ESA and NFMA apply to the Forest Service's management of the spotted owl.

Similarly, in the Land and Resource Management Plan for the National Forests of Mississippi the agency designates the redcockaded woodpecker, a federally listed endangered species under ESA, *see* 50 C.F.R. § 1711(h), as a management indicator species under

NFMA pursuant to section 219.19. *See* Declaration of Richard A. Stahl, Ex. D (Nov. 29, 1990) (Dkt. # 734).

The Forest Service Manual provides, in the section on "Wildlife, Fish, and Sensitive Plant Habitat Management":

> Incorporate consideration of wildlife, fish, and sensitive plant resources in forest plans as required by the National Forest Management Act, implementing regulations at 36 CFR 219, and direction at FSM 1920. Specifically:
>
> * * *
>
> 4. Determine habitat and management requirements *for the recovery of threatened, endangered, and sensitive species.*
>
> 5. Develop minimum management requirements for the maintenance of viable populations.

Forest Service Manual 2600, § 2621.1(4)(5) (U.S.C.A. Forest Service June 1, 1990) (emphasis added) (Dkt. # 812, Exh. B).

The Forest Services argues that its own interpretation of the statute should govern. *See Pyramid Lake Paiute Tribe v. United States Dep't of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990). However, an agency cannot exempt itself from duties plainly imposed by law; it cannot decide that only one of two statutes governs its activities when the laws themselves, and the implementing regulations, clearly show that both apply. *See Quinault v. Sullivan*, 916 F.2d 524, 526-27 (9th Cir. 1990). Moreover, if agency interpretation is determined by agency practice rather than by an argument raised in court, it is clear that the Forest Service

has understood at all times that its duties under NFMA and EPA are concurrent.

The listing of the northern spotted owl as a threatened species did not relieve the Forest Service of its obligations under NFMA or NEPA.

IV.

THE FOREST SERVICE'S NOTICE WITHDRAWING THE 1988 RECORD OF DECISION DOES NOT CONSTITUTE COMPLIANCE WITH THE NFMA'S PROCEDURAL REQUIREMENTS

The Forest Service contends that the *Federal Register* notice vacating the ROD, stating that the agency would act in a manner not inconsistent with the ISC recommendations, and announcing that the agency's regulatory authority for the planning and management of spotted owl habitat is superseded by the ESA, is lawful agency action. This argument depends, first, on the proposition that the Forest Service is bound by the notice to conform to the ISC report. The Forest Service has argued to this court:

> Significantly, the Federal Register notice has the same legal consequence as a regional guide. The requirement to comply with the ISC's strategy is mandatory . . . .
>
> The upshot is that while the notice adopted the ISC's strategy in a different way than contemplated by the regulations under NFMA, the notice still binds the agency in the same manner as a regional guide. . . .

Reply Memorandum in Support of Defendants' Motion for Summary Judgment at 5 (Jan. 15, 1991) (Dkt. # 786).

However, the Forest Service has argued the opposite in the Eastern District of California. In opposing a motion for a preliminary injunction in *Northcoast Environmental Center, et al., v. Paul Barker, et al.*, No. S-90-1250-EJG, it told the court:

> Plaintiffs allege that the Forest Service is now bound by the ISC conservation strategy. In making this argument, plaintiffs take the language out of context and completely ignore the major thrust of the announcement . . . .
>
> * * *
>
> Plaintiffs' sole theory for relief, that the ISC conservation strategy has now become a part of the Forest Service regional guide pursuant to 36 C.F.R. 219.4(b)(2), is expressly repudiated by the very language of the notice of decision itself.

Northcoast Environmental Center, et al., v. Paul Barker, et al. (S-90-1250-EJG E.D. Ca. 1990) (Dkt. # 822).

Counsel for the Forest Service in the present case did not represent the agency in the *Northcoast* case.

The agency has tried to mitigate this conflict by submitting a memorandum from its deputy chief to a regional forester expressing "concerns about the manner in which you are proceeding" in *Northcoast*, and stating:

> [O]ur position as reflected in all legal filings should be that the Forest Service is bound by the direction in the October 3, 1990, *Federal Register* notice, and that all timber management activities must comply with the ISC recommendations.

SAS's Supplemental Memorandum Re Forest Service Documents Submitted at Oral Argument on January 17, 1991, Exh. B (Jan. 25, 1991) (Dkt. # 800).

However, a statement by one agency executive to another as to what should be expressed in legal filings does not amount to a legal commitment that binds the agency. At best, the Forest Service's expressed views reflect a split of opinion in its ranks over whether it has bound itself to follow the ISC recommendations.

The basic question, however, is whether the Forest Service's expressed commitment to award further sales in a manner "not inconsistent with" those recommendations could in any event be held a lawful substitute for the procedural steps required by NFMA.

NFMA requires the Forest Service to develop regulations specifying guidelines for land management plans in order to provide for diversity of plant and animal communities. 16 U.S.C. § 1604(g)(1), (3)(B). The regulations require each region to develop a regional guide. 36 C.F.R. 219.8(a). The regional guides must contain standards and guidelines for forest planning. *Id.*

The process for adopting the regional guides is spelled out in detail in the regulations. Draft and final environmental impact statements must be prepared for the proposed standards and guideline. *Id.* § 219.08(c). Public participation in the process is mandated. *Id.*; see also 16 U.S.C. § 1604(d) ("The Secretary shall provide for public participation in the development, review, and revision of land management plans. . . . "). The Forest Service Chief's approval or disapproval of the proposed guide must be publicly documented. 36 C.F.R. § 219.08(d).

Once adopted, the regional guide may be amended. If the proposed amendment would result in a significant

change in the guide, the procedures required for developing the guide must again be followed to amend it. *Id.* § 219.08(f). Similar procedures are mandated at the forest planning level. *See id.* § 219.10.

The Forest Service argues that the notice adopting the ISC recommendations is "a set of guidelines and standards" with the "same legal consequences as a regional guide."

The difficulty with this argument – aside from the agency's ambivalence over whether it has bound itself – is that it assumes an administrative agency has the power to omit procedures required by law when it believes they would be unnecessary or inconvenient.

NFMA mandates a thorough process with participation by the public, the government, and the scientific community. The aim is to ensure both an informed public and an informed agency. *See* 36 C.F.R. § 210.6(a)(1), (2). The Forest Service here did not follow any of the procedures required before publishing the notice and announcing that it would act "not inconsistently" with the ISC report.

The ISC report is widely regarded as thorough, careful, and scientifically credible. But an agency cannot substitute its announced intention to follow a report – even a prestigious one – for the procedures required by law.

Nor can the statutory requirements be ignored because some conservation organizations urged the Forest Service last year to adopt the ISC recommendations. It does not appear that they urged adoption without public hearing or comment. Their statements tend to show they

believed still more should be done. For example, in a letter to the Secretaries of Agriculture and Interior, nine environmental groups wrote that the "ISC strategy cannot withstand any further balancing or compromise. It should, in fact, be strengthened, not weakened. . . . " Declaration of Allan Brock in Support of Defendants' Motion for Summary Judgment, Exh. M. (Dec. 5, 1990) (Dkt. # 740). In a separate letter to the Secretary of Agriculture, the National Audubon Society stated:

> [T]he ISC recommendations represent far less than the optimal approach to protecting the species, as these recommendations were skewed by economic and political considerations. The ISC plan, therefore, involves sizable risk that a viable population of owls will not be maintained.

Id., Exh. I.

But in any event neither the authors of such letters nor the Forest Service had the power to waive, in behalf of other organizations or the public, the procedures mandated by law.

The impetus to amend the 1988 ROD came from section 318. That statute directed the agency to review and revise the ROD, and in doing so to consider any new information, including the ISC report. The review, and any changes to the ROD, were to be completed and in effect by September 30, 1990. Section 318 did not change the hearing and impact statement procedures required by NFMA to make such an amendment. The Forest Service argues that where a statute imposes a deadline an impact statement is not required if the agency cannot prepare it within the time set for the decision. *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Ok.*, 426 U.S. 776, 788

(1976). The law, however, is that the agency must comply to the fullest extent possible; the provisions may not be used as a means of avoiding compliance with the directives of NEPA. *Id*. Here, the Forest Service has not shown that it could not have completed the EIS by, or at least close to, the appointed time. Most importantly, it has offered no reason why the process was never even begun. At a minimum the process could have been well along by the date set by Congress for completion. The agency had no basis for failing even to attempt compliance with the statutes.

V.

THE NEPA REQUIREMENTS ARE ADOPTED BY NFMA

In amending a regional guide in any significant way, the Forest Service is required by NFMA to follow NEPA procedures:

> If the change resulting from the proposed amendment is determined to be significant, the Regional Forester shall follow the same procedure for amendment as that required for development and approval of a regional guide.
>
> * * *
>
> A regional guide shall be developed for each administratively designated Forest Service region. . . . Regional guides shall provide standards and guidelines for addressing major issues and management concerns which need to be considered at the regional level to facilitate forest planning.

* * *

A draft and final environmental impact statement shall be prepared for the proposed standards and guidelines in the regional guide according to NEPA procedures.

36 C.F.R. § 219.8(f), (a), (c) (emphasis added).

The published notice withdrawing the 1988 ROD, stating that the Forest Service would proceed not inconsistently with the ISC report, and amending the forest plans accordingly, plainly amounted to a "significant" proposed amendment. Therefore, draft and final environmental impact statements were required. Since this requirement is contained in NFMA itself, it is not necessary to decide whether NEPA would be applicable but for the NFMA adoption of the same procedures. *See* 16 U.S.C. § 1604(g)(1).

VI.

MBTA DOES NOT APPLY

MBTA makes it illegal to "pursue, hunt, take capture, kill, attempt to take, capture, or kill . . . " any migratory bird or "any part, nest, or egg of any such bird" by any means or in any manner, 16 U.S.C. § 703, except as may be permitted by a valid permit issued pursuant to regulations, 50 C.F.R. 21.11. The northern spotted owl is a migratory bird as defined by the regulations. 50 C.F.R. 10.13.

Whether the Forest Service's timber management plan, or timber sales fashioned pursuant to it, violate MBTA depends on the interpretation of "taking." Under the regulations promulgated pursuant to MBTA, to "take"

is to "pursue, hunt, shoot, wound, kill, trap, capture, or collect," or to attempt any such act. 50 C.F.R. § 10.12. Under ESA, to "take" is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). "Harm" under ESA means

> an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

SAS asks the court to engraft ESA's broader definition of a "taking" onto MBTA. It relies upon a Supreme Court case declaring protection of migratory birds to be a "national interest of very nearly the first magnitude," *State of Missouri v. Holland*, 252 U.S. 416 (1920), and another stating that ESA sheds light upon similar terms in MBTA, *Andrus v. Allard*, 444 U.S. 51, 62 (1979).

But the differences between a "taking" under ESA and MBTA are distinct and purposeful. ESA, enacted in 1973, included "harass" and "harm" in the definition. Pub. L. 93-205, § 3, 87 Stat. 885. Congress amended MBTA the following year, and did not modify its prohibitions to include "harm." Pub. L. 93-300, § 1, 88 Stat. 190. It is the "harm" part of the definition that makes "significant habitat modification or degradation" illegal. The Court cannot do what Congress, and the Department of Interior, did not do. The statute and regulations intended to preserve an endangered or threatened species differ from those adopted pursuant to international treaties. This is

illustrated by the exception, from the prohibition on taking migratory birds, for the regulated hunting of migratory game birds. *See* 50 C.F.R., Part 20.

SAS points out that the taking of migratory birds is prohibited "at any time, by any means or in any manner," 16 U.S.C. § 703. But the cases regarding MBTA violations do not support the kind of application urged here. *See, e.g., United states v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (killing of migratory birds by dumping wastewater); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Ca.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978) (deaths of birds resulting from misapplication of pesticides).

The parties disagree as to whether a private party may obtain judicial review of agency action challenged as violative of MBTA in the first place. While the answer is not entirely clear, the court concludes that, in a proper case, jurisdiction would exist under MBTA, APA (5 U.S.C. § 702), and 28 U.S.C. § 1331. *See Merrell v. Thomas*, 807 F.2d 776, 782 n.3 (9th Cir.), *cert. denied*, 484 U.S. 848 (1987). But the challenge brought here cannot succeed because the Forest Service's action in awarding timber sales would not involve a "taking" of migratory birds within the meaning of MBTA.

VII.

THE QUESTION WHETHER THE 1988 ROD VIOLATED NFMA AND NEPA IS MOOT IN VIEW OF THE AGENCY'S WITHDRAWAL OF IT

The Forest Service's notice published at 55 Fed. Reg. 40412 withdrew the December 1988 ROD in its entirety.

Nothing has been substituted in its place. The agency has not adopted a new or amended ROD.

SAS has moved nevertheless for summary judgment that the discarded ROD is in violation of the environmental statutes. It must be kept clearly in mind that the motion is addressed to the ROD as an administrative measure. The same standards, modified to increase the size of protected areas, were adopted by Congress as to fiscal year 1990 sales in section 318: "All other standards and guidelines contained in the Chief's Record of Decision are adopted." Section 318(b)(3). That enactment of ROD standards as temporary statutory law is not challenged by SAS's motion. SAS argues, however, that with the expiration of section 318 the ROD must now be tested for legality under the general environmental statutes.

The Forest Service has agreed that, if the question were reached on the merits, the answer would have to be that the ROD fails to comply with applicable law. There is now no dispute that the ROD would fail to maintain a viable population of northern spotted owls. The agency argues, however, that the question should not be reached because no case or controversy exists, the ROD having been withdrawn.

On this point the Forest Service is correct. Under Article III of the constitution the courts are "to decide actual controversies . . . and not to give opinions upon . . . abstract propositions." *Mills v. Green*, 159 U.S. 651, 653 (1895). If the question to be adjudicated is mooted by later developments, no justiciable controversy is presented. *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Here the ROD has been withdrawn in its entirety by the Forest

Service, and as matters now stand it cannot and will not be a basis for agency action. Accordingly, the question whether the discarded ROD would violate environmental statutes is academic; it need not and should not be decided. *See Racine v. United States*, 858 F.2d 506 (9th Cir. 1988).

VIII.

DISMISSAL OF WCLA's COMPLAINT

WCLA in its complaint has challenged the 1988 ROD as unlawful, but has not sought relief based on other Forest Service action. The Forest Service now moves for dismissal on the ground that no case or controversy exists in view of the withdrawal of the ROD. WCLA has not opposed the motion. The motion is granted and WCLA's complaint is dismissed without prejudice. The briefs and arguments of WCLA's counsel have been valuable throughout this litigation. As to any future issues in the case, *amicus curiae* briefs from counsel may be filed.

IX.

SAS'S MOTION RE FIVE SALES EARLIER ENJOINED OR WITHDRAWN

SAS has moved for summary judgment under NFMA, NEPA, and MBTA as to five timber sales that were enjoined earlier under section 318, or were withdrawn by the Forest Service, and are not currently proposed. The Forest Service has responded that the question is moot. The sales involved are the Garden, Nita, and South Nita sales (enjoined), and the First and Last sales (withdrawn after a challenge was filed). Nothing in

the record suggests that the Forest Service plans to go forward with these sales. There is accordingly no case or controversy as to them. SAS's motion is denied without prejudice to its renewal should the Forest Service advertise or otherwise proceed with any of these five sales.

X.

SUMMARY OF RULINGS

The rulings now made may be summarized as follows:

1. The motion of SAS for summary judgment declaring unlawful the Forest Service's proposal to long northern spotted owl habitat without complying with NFMA is granted. The agency's failure to date to comply, or begin compliance, with NFMA requirements is arbitrary and capricious, and not in accordance with law. The same motion in regard to NEPA is moot since NFMA directs that the NEPA procedures be followed. The motion in regard to MBTA is denied since that statute is inapplicable. The Forest Service's cross-motions on the same subjects are denied in part and granted in part accordingly.

2. SAS's motion for summary judgment determining that the December 1988 ROD violates the environmental statutes is denied because the ROD has been withdrawn. The Forest Service's cross-motion for a determination that no case or controversy exists is granted, and SAS's claims seeking relief as to the now-discarded ROD are dismissed without prejudice.

3. The Forest Service's motion to dismiss WCLA's complaint, on the ground that no case or controversy

presently exists, is granted, and that complaint is dismissed without prejudice.

4. SAS's motion for summary judgment as to five sales that were enjoined earlier under section 318, or were withdrawn by the Forest Service, and are not currently proposed, is denied without prejudice because no case or controversy is now presented.

XI.

HEARING AS TO INJUNCTIVE RELIEF

Oral argument as to what injunctive relief, if any, should be ordered in light of the foregoing rulings, and as to whether any basis exists to amend the December 18, 1990, order enjoining the award of twelve timber sales, will be held at 8:00 a.m. on March 12, 1991. Counsel should plan on having twenty minutes per side. Counsel from outside the district, or who cannot be present, may take part by telephone. No additional briefs are to be filed in advance of the hearing.

The clerk is directed to send copies of this order to all counsel of record.

Dated: March 7, 1991.

/s/ William L. Dwyer
William L. Dwyer
United States District Judge

APPENDIX C

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE AUDUBON SOCIETY; PILCHUCK AUDUBON SOCIETY; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON NATIVE PLANTS SOCIETY; OREGON NATURAL RESOURCES COUNCIL, INC.; PORTLAND AUDUBON SOCIETY; LANE COUNTY AUDUBON SOCIETY; Plaintiffs-Appellants, WASHINGTON CONTRACT LOGGERS ASSOCIATION; WILLIAM PICKELL, Plaintiffs-Appellees, vs. F. DALE ROBERTSON, in his official capacity as Chief, United States Forest Service; UNITED STATES FOREST SERVICE, an agency of the United States, Defendants-Appellees.	No. 90-35774 D.C. No. CV-89-16-WLD OPINION FILED APR 23 1991

Appeal from the United States District Court for the Western District of Washington
William L. Dwyer, District Judge, Presiding

Argued and Submitted February 11, 1991
San Francisco, California

Filed: April 26, 1991

Opinion by Judge Harry Pregerson

Before: GOODWIN, SCHROEDER, and PREGERSON, Circuit Judges.

PREGERSON, Circuit Judge:

We have before us once again the controversy over logging of the old growth forests of the Pacific Northwest and the impact of the logging on the northern spotted owl. Today's dispute is a consequence of our recent decision in this very case, which we filed on September 18, 1990, and amended on October 30. *See Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990). We held that Congress violated the separation of powers doctrine when it enacted section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, 103 Stat. 701, 745-50 (1989) ("Section 318").[1] A few days after our mandate issued, Seattle Audubon Society and other plaintiff organizations challenged the United States Forest Service's decision to allow logging on six tracts of old growth forest. The district court held that these six challenges were untimely. We reverse.

I.

The logging of old growth forests poses a grave danger to the continued survival of the northern spotted owl. This litigation began as a challenge to the Forest Service's 1988 administrative decision to continue logging in the thirteen national forests of Oregon and Washington where spotted owls still survive. The decision was

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[1] More specifically, we held that the first sentence of subsection (b)(6)(A) violated the Constitution. 914 F.2d at 1317.

set out in a December 8, 1988 Record of Decision (ROD) signed by the Chief of the United States Forest Service, and in an accompanying Final Supplement to the Environmental Impact Statement for an Amendment to the National Regional Guide. Although the plan did not authorize logging in designated Spotted Owl Habitat Areas, the plaintiffs contend the plan's protections are wholly inadequate and are based on a flawed evaluation of the danger that continued logging poses to the owl's habitat. In early 1989, the plaintiffs filed suit United States District Court in Seattle and asked for declaratory and injunctive relief. The complaint alleged that by adopting the plan, the Forest Service violated the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), and the Migratory Bird Treaty Act (MBTA).[2]

The Washington Contract Loggers Association also challenged the Forest Service's Plan in the United States District Court in Seattle. It contended that the plan did not permit enough logging. The district court denied the loggers' motion for a preliminary injunction and

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[2] Plaintiffs contend that the plan violates the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988), by failing to consider adequately the [sic] how the planned logging would affect the spotted owl. It allegedly violates the National Forest Management Act, 16 U.S.C. §§ 1600-1687 (1988), by failing to assure that a viable population of northern spotted owls will be maintained. Finally, the plaintiffs contend that the plan violates the Migrating Bird Treaty Act, 16 U.S.C. §§ 703-712 (1988), by allowing harm to the owls or their habitat.

consolidated their case with the litigation filed by Seattle Audubon Society.[3]

In March 1989, the district court granted Seattle Audubon's motion for a preliminary injunction against 163 specified timber sales. In May 1989, the court preliminarily enjoined all sales of timber that comprised more than forty acres of old-growth forest.

With this injunction against significant sales of the Forest Service's old-growth forest in place, and with a similar lawsuit on behalf of the spotted owl pending against the Bureau of Land Management in United States District Court in Portland,[4] Congress took action. In enacting section 318, "The Northwest Timber Compromise of 1989," Congress declared that it attempted to balance the goals of ensuring a predictable supply of timber, protecting the northern spotted owl, and preserving significant stands of old-growth forest. H. R. Conf.

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[3] In this appeal, the loggers defend the decision of the district court, and we therefore regard them as defendants.

[4] The Portland Audubon Society and other environmentalist and conservationist organizations, some of which are also plaintiffs in the case before us today, sued in Portland to protect the northern spotted owl on land administered by the Bureau of Land Management. That lawsuit, filed in 1987, has been before us two separate times at the time Congress passed Section 318, the legislation that we must interpret again today. *See Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, 109 S. Ct. 3229 (1989); *Portland Audubon Society v. Lujan*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1470 (1990). When the Portland case was before us a third time in 1990, we consolidated it with the Seattle litigation and issued the ruling on section 318 that we follow up on today. *See Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990).

Rep. No. 264, 101st Cong., 1st Sess. 87 (1989). Congress enacted section 318 as a temporary measure to govern the old-growth forests until the end of the fiscal year, September 30, 1990. Section 318(a)(1) required that the Forest Service offer 7.7 billion board feet of timber for sale from the national forests of Oregon and Washington, with 5.8 billion board feet to come from the thirteen national forests that contain northern spotted owls.[5] In subsection (b)(3), the Act provided that no logging would be permitted in areas designated as Spotted Owl Habitat Areas (SOHAs) in the Forest Service plan adopted in 1988. Subsection (b)(3) also increased the size of several specified SOHAs, thus setting aside additional acreage where logging would be banned. Subsection (b)(3)(F) referred to the 1988 forest management plan and provided that "[a]ll other standards of guidelines contained in the Chief's Record of Decision are adopted."

Section 318 included some substantive and procedural criteria to guide the Forest Service in selecting areas of the forest for logging. For example, subsection (b)(1) instructed the Forest Service to minimize fragmentation of ecologically significant old growth forest that contains northern spotted owls. It also provided that location of proposed timber sales would be reviewed by advisory panels of local citizens with diverse views, and

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[5] Section 318(a)(2) set a timber sales quota for the Bureau of Land Management. In this opinion, we discuss only the provisions of section 318 that apply to the Forest Service and the litigation challenging its management of the old-growth forests.

it required the Forest Service to consider the input provided by these citizen groups.

In subsection (g), section 318 provided for expedited judicial review of administrative decisions to offer particular tracts of timber for sale. It required that challenges to a timber sale be filed in district court within fifteen days of its advertisement. It further provided that courts could not temporarily restrain or preliminarily enjoin administrators from carrying out decisions made during fiscal year 1990 to sell timber in forests inhabited by spotted owls. Courts retained, however, the power to permanently enjoin, modify, or void a proposed timber sale that was arbitrary, capricious, or otherwise not in accord with the law. Subsection (g) further provided that challenges to timber sales would take priority on the calenders of district courts, which were required to rule on the merits within forty-five days, unless the Constitution required more time.

The focus of our recent decision was subsection (b)(6)(A), where Congress attempted to overrule the preliminary injunction issued by the district court judge in this case. In subsection (b)(6)(A), Congress identified this lawsuit by its case name and its docket number in the district court. Congress declared that management of Forest Service land in accordance with the guidelines of subsection (b)(3) adequately satisfied the requirements of the statutes on which the plaintiffs based their complaint.[6]

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[6] Subsection (b)(6)(A) referred generally to the statutes upon which the plaintiffs relied without specifically

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Section 318 became law on October 23, 1989. On November 6, the district court concluded that subsection (b)(6)(A) required that it vacate its preliminary injunction. It ruled that Congress had temporarily suspended, during fiscal year 1990, the environmental laws that the plaintiffs invoke in this litigation. The district court did not dismiss the case but retained jurisdiction, expecting the controversy to resume after the end of fiscal year 1990.[7]

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mentioning the National Environmental Policy Act, the National Forest Management Act, or the Migratory Bird Treaty Act. The portion of subsection (b)(6)(A) relevant to the Seattle litigation provided:

> Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide – Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 . . . , the Congress hereby determines and directs that management of areas according to subsection[] (b)(3) . . . of this section on the thirteen national forests in Oregon and Washington . . . known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction). . . .

Pub. L. 101-121, § 318(b)(6)(A), 103 Stat. 701, 747 (1989).

[7] The court noted that subsection 318(g) provided for expedited review of decisions to offer particular timber sales.

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On appeal, we reversed and held that courts cannot give effect to the first sentence of subsection (b)(6)(A). We explained that Congress violated the separation of powers doctrine by attempting to dictate to the judiciary how to decide the outcome of a pending case. We acknowledged that Congress has the power to affect the outcome of a pending case by amending the legislation upon which the litigants rely. We concluded, however, that Congress had not amended the National Environmental Policy Act, the National Forest Management Act, or the Migratory Bird Treaty Act. Because those statutes were still in place, it was the job of the judiciary, not the Congress, to determine whether the actions of the Forest Service complied with those statutes. *See Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990). Our mandate issued on September 24, 1990.

Within three days, the plaintiffs challenged six timber sales as violating provisions of the National Environmental Policy Act, the National Forest Management Act, and the Migratory Bird Treaty Act. They asked for a permanent injunction. The plaintiffs acknowledged that their challenges were not filed within fifteen days of the initial

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The court announced that the parties could challenge particular sales under subsection (g) by filing motions instead of initiating new lawsuits. Accordingly, when Seattle Audubon alleged that particular Fiscal Year 1990 timber sales violated the non-fragmentation provisions of section 318, it proceeded by filing motions for partial summary judgment in this already pending case. Similarly, the challenge to the six sales before us today was initiated by a motion for partial summary judgment.

advertisement of the timber sales, as required by subsection (g) of section 318. Without disputing the general applicability of the 15-day limitations period, plaintiffs argued that the doctrine of equitable tolling should excuse their late challenges. They argued that the limitations period should be tolled during the time that their challenge to the constitutionality of subsection (b)(6)(A) was pending before this court. The district court ruled that the doctrine of equitable tolling did not apply to the 15-day limitations period of subsection (g). It further ruled that even if the limitations period could be equitably tolled, the plaintiffs were not entitled to the benefits of the doctrine in this case. We have jurisdiction over this timely interlocutory appeal under 28 U.S.C. § 1292(a)(1) (1988).

II.

Plaintiffs do not challenge the applicability of the fifteen-day limitations period. For the purposes of this appeal, we therefore assume, without deciding, that this limitations period ordinarily governs challenges to Fiscal Year 1990 timber sales that are based on the National Environmental Policy Act, the National Forest Management Act, and the Migratory Bird Treaty Act.[8] The

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[8] Congress clearly intended the fifteen-day limitations period to apply to challenges that asserted that a Fiscal Year 1990 timber sale violated provisions of section 318. For example, subsection (g) provides only fifteen days to file a claim alleging that a proposed sale violates 318(b)(1) by failing to minimize fragmentation of old-growth forest. It is not so clear, however, that Congress intended subsection (g) to apply to

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question before us is whether the doctrine of equitable tolling applies to the fifteen-day limitations period. Because we answer that question in the affirmative, the next question is whether the limitations period should be tolled in this particular case. Ordinarily, that is a question for the district court in the first instance. We reach that question today, however, because the district court has already considered it in its alternative holding.

A.

When the district court ruled that the principles of equitable tolling did not apply, it did not have the benefit of the Supreme Court's recent decision in *Irwin v. Veterans Administration*, 111 S. Ct. 453 (1990). *Irwin* simplifies the first stage of our inquiry. The Court held that whenever Congress waives the government's sovereign immunity and permits suit against the government, there is a rebuttable presumption that the doctrine of equitable tolling applies. *Id.* at 457.

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claims based on the National Environmental Policy Act, the National Forest Management Act, or the Migratory Bird Treaty Act. By enacting the unconstitutional subsection (b)(6)(A), Congress apparently intended to bar altogether any claims based on these three statutes. In our earlier decision, we declined to give effect to that intent, and we made it clear that plaintiffs are entitled to pursue their claims under these three statutes. *See Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990). We have not yet had to decide whether our earlier decision affects the scope of what is otherwise the plain language of subsection (g). Nor do we decide that question today.

There is nothing in the text of section 318 itself to rebut the presumption that equitable tolling applies to the fifteen-day period. Nor do we find that permitting equitable tolling in appropriate cases would be inconsistent with the purposes of section 318. Congress clearly intended to preserve the opportunity for judicial review of timber sales offered during the fiscal year. Congress directed the Forest Service to harvest a specified quantity of timber, but it did not authorize the agency to fulfill its mission arbitrarily, capriciously, or otherwise in violation of law. Equitable tolling is completely consistent with the goal of a legal timber harvest. Congress also intended that court challenges be completed quickly, and it therefore provided for expedited procedures. Although permitting equitable tolling may sometimes interfere with the goal of expedition, it may advance Congress's goal of ensuring that timber sales comply with the law. We cannot conclude that Congress's preference for proceeding with dispatch overrides its goals of preserving the usual opportunity to assure that timber harvesting complies with all applicable law. We therefore conclude that the fifteen-day limitations period is subject to equitable tolling in an appropriate case.

B.

Federal courts have applied the doctrine of equitable tolling in two generally distinct kinds of situations. In the first, the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant. In the second, extraordinary circumstances beyond plaintiffs' control made it impossible to file the claims on time. An excellent discussion of the application

of these principles of equitable tolling can be found in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549-50 (N.D. Cal. 1987).

Plaintiffs argue that extraordinary circumstances beyond their control prevented them from challenging these timber sales within fifteen days of their advertisement for sale. The extraordinary circumstances, they contend, were that an unconstitutional statute, subsection (b)(6)(A), and the district court's erroneous upholding of that statute, barred them from filing the claims they now seek to litigate. They argue that the limitations period was equitably tolled until we reversed the district court by holding that subsection (b)(6)(A) was unconstitutional.

Courts have held that when external forces, rather than plaintiff's lack of diligence, account for the failure to file a timely claim, equitable tolling is proper. When courts have actually been closed by conditions of war, statutes of limitations are equitably tolled. *See Hanger v. Abbott*, 73 U.S. (6 Wall.) 532 (1867) (courts in southern states closed during Civil War). Similarly, when war prevents a plaintiff from gaining access to a court that has remained open, the principles of equitable tolling apply. *See Osbourne v. United States*, 164 F.2d 767 (2d Cir. 1947) (plaintiff held in Japan during the Second World War unable to file his claim in court). In *Osbourne*, the court explained:

> All statutes of limitations are based on the assumption that one with a good cause of action will not delay in bringing it for an unreasonable period of time; but, when a plaintiff has been denied access to the courts, the basis for the assumption has been destroyed.

Id. at 769, *quoted in Forti v. Suarez-Mason*, 672 F. Supp. at 1550. Even when physical access to a functioning court is possible, equitable tolling may nevertheless be proper if there is no real possibility of gaining relief in court. *See Suarez-Mason*, 672 F. Supp. at 1550.

Plaintiffs rely on *Osbourne* and argue that until our decision of September 18, 1990, they were effectively denied access to the courts by circumstances beyond their control. They contend that they were barred from bringing their claims by the unconstitutional enactment of subsection (b)(6)(A) and the district court's erroneous enforcement of it. Under the district court's ruling of November, 1989, the plaintiffs had no claims under the National Environmental Policy Act, the National Forest Management Act, or the Migratory Bird Treaty Act. The court ruled, erroneously, that Congress had amended these statutes to excuse the very violations of law that plaintiffs sought to redress.

Plaintiffs diligently appealed that ruling. Within a few months, while that appeal was still pending, the district court reiterated its position when ruling on a separate motion. On January 30, 1990, the court declared that during fiscal year 1990, it would test the legality of Forest Service actions in the national forests containing spotted owls solely by the provisions of section 318. Any claims based on the National Environmental Policy Act, the Migratory Bird Treaty Act, or the National Forest Management Act would be dismissed on the court's own motion, without requiring the defendants to file briefs.

After the court's order of January 30, plaintiffs filed challenges to some Fiscal Year 1990 timber sales on the

grounds that they violated provisions of section 318. For example, plaintiffs challenged some sales on the grounds that the Forest Service failed to minimize fragmentation of ecologically significant old-growth forest, in violation of 318(b)(1). The plaintiffs did not, however, base any challenges on the National Environmental Policy Act, the National Forest Management Act, or the Migratory Bird Treaty Act until after our decision of September 18, 1990. Our mandate in that case issued on September 24, and within three days the plaintiffs filed the challenges before us today.

The defendants contend that plaintiffs were not denied access to the courts. They maintain that nothing barred challenges based on NEPA, NFMA, or the MBTA except the plaintiffs' lack of diligence. The fact that the statute purported to remove the legal grounds for plaintiffs' challenges, defendants contend, merely shows that plaintiffs risked losing any challenges they might file. Defendants contend that the prospect that a lawsuit will be unsuccessful does not merit tolling of the statute of limitations. Defendants apparently contend that the plaintiffs could be regarded as diligent only if, while their appeal was pending in this court, they had separately challenged each timber sale in the district court within the fifteen-day limitations period, notwithstanding the district court's warning that such challenges would be summarily dismissed.

In light of the purpose of statutes of limitations and the particular circumstances of this unusual case, we cannot say that the plaintiffs were not diligent. At all times, the defendants were on notice of the plaintiffs' claims that subsection (b)(6)(A) was unconstitutional and

that the plans for logging violated NEPA, NFMA, and the MBTA. The plaintiffs were diligently pursuing their challenge to the constitutionality of (b)(6)(A) in the appellate court. Under the procedures the district court announced at the time it upheld subsection (b)(6)(A), any challenges to individual timber sales would be filed as motions for partial summary judgment. *See supra* note 7. We do not accept defendants' contention that, while that appeal was pending, plaintiffs slept on their rights by failing to file a separate motion for summary judgment each time they believed a timber sale violated the three statutes that the district court erroneously believed had been temporarily repealed. The district court's view that subsection (b)(6)(A) was constitutional was already the law of the case. It was clear that the district court would have dismissed each separate motion.

The logical corollary of defendants' overly strict view would further hold that plaintiffs could have diligently preserved their rights only by separately appealing each dismissal of a challenge. We do not believe that the equitable principles that govern tolling would require such a waste of judicial resources. Plaintiffs should not have to file multiple appeals raising the same legal issue against the same defendants in the same case. Under the circumstances, we agree that the unconstitutional statute and the district court's erroneous interpretation of it barred these otherwise diligent plaintiffs from raising the claims they now seek to litigate. We conclude that they meet the threshold requirements for equitable tolling.

We also conclude that the defendants will not be unjustly prejudiced by tolling the statute of limitations. This is certainly not a case in which they will be forced to

defend a stale claim. Memories have not faded. Witnesses have not disappeared. Documents are accessible. The defendants can argue that they were prejudiced only if they relied to their detriment on the fact that no challenge was filed within the fifteen-day limitations period. The loggers argue that the expedited process of subsection (g) allowed buyers of timber to be "certain" that a sale unchallenged after fifteen days was "immune" from litigation. We disagree. The buyers of timber did not sign contracts with any such expectation of immunity. A recision clause permits the government to terminate the contracts to comply with a court order, even if the particular sale is not named in that order. The timber buyers knew that the plaintiffs were vigorously contesting the Forest Service's logging plans on a number of legal fronts, including the appeal that resulted in our decision of September 18, 1990. We do not believe that any buyers of timber reasonably relied on a belief that the expiration of the fifteen-day period rendered the sales immune from challenge. We therefore conclude that equitable tolling would not unjustly prejudice the Washington Contract Loggers Association.

The Forest Service argues that equitable tolling would prejudice its efforts to meet the timber harvest quota that Congress set for Fiscal Year 1990. Because the fiscal year has already expired, the Forest Service will be unable to substitute other unsold tracts for any sales that the plaintiffs might successfully challenge. We conclude, however, that any prejudice to the Forest Service's efforts cannot be traced to a decision to toll the limitations period. The Forest Service failed to fulfil the timber quota set by section 318. *See Gifford Pinchot Alliance v. Butruille,*

752 F. Supp. 967, 972 (D. Or. 1990). Because the agency was trying its best to fulfill the Congressional directive to offer 7.7 billion board feet for sale, *id.*, we can conclude that any unsold tracts of timber that could have been prepared for sale in fiscal year 1990 were indeed prepared and offered for sale. The Forest Service could not have substituted other tracts for the ones challenged here. Thus, the Forest Service did not rely to its detriment on the fact that these particular sales were not challenged within the fifteen-day limitations period. The Forest Service's "prejudice" argument is really an argument that the environmental statutes themselves – not our decision to toll – interfere with the agency's efforts to meet the timber harvest quota.

We conclude that the plaintiffs in this case did not sleep on their rights. Their diligent efforts to litigate their claims were blocked in the district court until we declared subsection (b)(6)(A) unconstitutional and explained that nothing in section 318 amended the environmental statutes upon which plaintiffs rely. Equitable tolling in this case will not interfere with the purposes of limitations periods and will not cause unjust prejudice to the defendants. We therefore conclude that the plaintiffs' challenges to the six timber sales can proceed.

III.

In a footnote in their reply brief, plaintiffs suggest that a ruling in their favor will also function to equitably toll the remainder of the fifteen-day period during the

entire time this appeal has been pending before us.[9] We disagree. The district court should have the first opportunity to consider whether equitable tolling is proper in a given case, and it has had no opportunity to consider whether the remainder of the fifteen-day period should be tolled during the pendency of this appeal. The reasoning of today's opinion does not automatically determine whether the limitations period should be tolled during the time this appeal has been pending. The issues are different. For example, plaintiffs cannot argue that an unconstitutional statute barred new challenges to timber sales during the entire time this appeal has been before us.[10] Moreover, we do not believe that a footnote in a

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[9] Plaintiffs calculate that if we accepted their position, they would have seven additional days to file challenges to any 1990 timber sales governed by the fifteen-day limitations period of subsection (g). They base these calculations on two premises. The first premise is that the fifteen-day period was tolled until September 24, 1990, when we issued the mandate after filing our opinion of September 18. Second, plaintiffs contend that the tolling resumed on October 2, 1990, when they filed their notice that they were appealing, the district court's ruling that equitable tolling did not apply. Plaintiffs' first premise is correct. We express no opinion on the second.

[10] Plaintiffs have argued in this case that until we issued our opinion of September 18, 1990, they were barred from pursuing their claims by the operation of an unconstitutional provision in subsection (b)(6)(A). After we issued our opinion of September 18, and certainly after we clarified and amended it on October 30, neither the statute itself nor the district court's interpretation of the statute prevented the plaintiffs from challenging 1990 timber sales on the grounds that they violated the National Environmental Policy Act, the Migratory Bird Treaty Act, or the National Forest Management Act. The

(Continued on following page)

reply brief properly raised the issue whether the limitations period should be tolled while this appeal is pending. Today's decision, therefore, holds only that the doctrine of equitable tolling permits the plaintiffs to challenge the six timber sales involved in this appeal.

IV.

The order of the district court is vacated, and this case is remanded for further proceedings. The parties will pay their own costs. The mandate shall issue immediately.

COUNSEL PAGE

Todd D. True, Sierra Club Legal Defense Fund, Seattle, Washington, attorney for plaintiffs-appellants, Seattle Audubon Society, et al.

Mark C. Rutzick, Preston, Thorgrimson, Ellis & Holman, Portland, Oregon, attorney for plaintiffs-appellees, Washington Contract Loggers Association.

Anne S. Almy, United States Department of Justice, Washington, D.C., attorney for defendants-appellees, F. Dale Robertson and United States Forest Service.

(Continued from previous page)

plaintiffs' claim that the fifteen day limitations period is tolled during the entire time this appeal has been pending amounts to an argument that the district court, by ruling that equitable tolling did not apply, had effectively barred plaintiffs from the courts. This separate question has not been briefed and is not before us.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al., Plaintiffs, v. JOHN L. EVANS, et al., Defendants. and WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al., Intervenors.	NO. C89-160WD ORDER ON SAS'S RENEWED MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION RE SIX TIMBER SALES FILED MAY 24 1991

Plaintiffs Seattle Audubon Society, et al., ("SAS") have renewed their motion for summary judgment declaring that defendants John L. Evans, et al., ("Forest Service") have violated certain federal statutes, and for injunctive relief, in regard to six fiscal year 1990 timber sales that include northern spotted owl habitat. This court originally held the challenges to these six sales barred by the fifteen-day statute of limitations of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989) ("section 318"). The court of appeals reversed, holding that the statute of limitations was equitably tolled. *Seattle Audubon Society, et al., v. Robertson*, No. 90-35774 (9th Cir. 1991). The Forest

Service and intervenors Washington Contract Loggers Association, et al., ("WCLA") oppose the renewed motion. All materials filed in support of or opposition to the motion, and the arguments of counsel presented by telephone conference call on May 24, 1991, have been fully considered.

The law on this subject is set out in the Order on Motions Heard December 5, 1990 (Dec. 18, 1990) (Dkt. # 757), and the Memorandum Decision and Injunction entered on May 23, 1991 (Dkt. # 937).

Of the six sales now at issue, two have not been awarded. These are the Horse Byars and Median Buyback sales. Two others have been awarded but operation of them has not begun. These are the Louise and Wings sales. Two sales were awarded in September 1990, expenses have been incurred in their operation, and logging has begun. These are the Coon Skinner and High Spud sales. On the Coon Skinner sale, logging has been completed on 75 of the 114 acres. As to these two, but not as to the others, the balance of equities is against the issuance of an injunction.

Accordingly, it is ordered and adjudged that:

1. SAS's motion for summary judgment declaring that the six sales in issue have been offered by the Forest Service in violation of the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 *et seq.*, is granted for the reasons stated in the Order on Motions Heard December 5, 1990 (Dkt. # 757) and in the Order on Motions for Summary Judgment and for Dismissal (Mar. 7, 1991) (Dkt. # 824). The Forest Service's cross-motion for summary judgment is denied.

2. The Forest Service is enjoined, for the reasons stated in the December 18, 1990, March 7, 1991, and May 23, 1991 orders cited above, from further awarding or operating the Wings, Louise, Median Buyback, and Horse Byars timber sales until it complies with NFMA as heretofore ordered.

3. SAS's motion for an injunction as to the Coon Skinner and High Spud sales is denied.

The clerk is directed to send copies of this order to all counsel of record.

Dated: May 24, 1991.

/s/ William L. Dwyer
Judge William L. Dwyer
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND AUDUBON SOCIETY, HEADWATERS, LANE COUNTY AUDUBON SOCIETY, OREGON NATURAL RESOURCES COUNCIL, THE WILDERNESS SOCIETY, SIERRA CLUB, INC., SISKIYOU AUBUDON [sic] SOCIETY, CENTRAL OREGON AUBUDON [sic] SOCIETY, KALMIOPSIS AUDUBON SOCIETY, UMPQUA VALLEY AUBUDON [sic] SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL,

Plaintiffs,

v.

MANUEL LUJAN, JR., in his official capacity as Secretary, United States Department of Interior,

Defendant,

and

NORTHWEST FOREST RESOURCE COUNCIL, HUFFMAN & WRIGHT LOGGING CO., FRERES LUMBER CO., INC., LONE ROCK TIMBER CO., INC., SCOTT TIMBER CO., CLEAR LUMBER MANUFACTURING CORP., YONCALLA TIMBER PRODUCTS, INC., CORNETT LUMBER COMPANY, INC., ASSOCIATION OF O & C COUNTIES and BENTON COUNTY, DOUGLAS COUNTY FOREST PRODUCTS COMPANY, MEDFORD CORPORATION, ROGGE FOREST PRODUCTS, INC.,

Defendant-Intervenors.

Civil No. 87-1160-FR

OPINION

FILED MAY 8 91

Victor M. Sher
Todd D. True
Corrie Yackulic
Sierra Club Legal Defense Fund
216 First Avenue, South, Suite 330
Seattle, Washington 98104

Attorneys for Plaintiffs Portland Audubon Society, Headwaters, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Salem Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council

Michael D. Axline
John E. Bonine
David Atkin
Western Natural Resources Law Clinic
University of Oregon School of Law
Eugene, Oregon 97403

Attorneys for Plaintiffs Lane County Audubon Society and Oregon Natural Resources Council

Charles H. Turner
United States Attorney
Thomas C. Lee
Assistant United States Attorney
312 U. S. Courthouse
Portland, Oregon 97205

Roger W. Nesbit
Special Assistant United States Attorney
500 N. E. Multnomah Street, Suite 607
Portland, Oregon 97232

Attorneys for Defendant

Mark C. Rutzick
Cynthia L. Hull
Preston Thorgrimson Shidler Gates & Ellis

111 S. W. Fifth Avenue, Suite 3200
Portland, Oregon 97204-3635

Attorneys for Defendant-Intervenors Northwest Forest Resource Council, Huffman & Wright Logging Co., et al., and Douglas County Forest Products, et al.

Phillip D. Chadsey
Kevin Q. Davis
Stoel Rives Boley Jones & Grey
900 S. W. Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268

Attorneys for Defendant-Intervenor Association of O & C Counties and Benton County

FRYE, Judge:

The motions pending before the court are:

1) plaintiffs Portland Audubon Society, et al.'s motion for summary judgment and injunctive relief (#530);

2) defendant Manual Lujan's second motion for summary judgment (#554);

3) defendant-intervenor Association of O & C Counties and Benton County's motion to strike plaintiffs' statement of undisputed facts (#571);

4) defendant-intervenor Association of O & C Counties and Benton County's motion for partial summary judgment (#585); and

5) defendant-intervenor Northwest Forest Resource Council's motion for summary judgment (#589).

BACKGROUND

This is an action for declaratory and injunctive relief brought by plaintiffs, Portland Audubon Society, Headwaters, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Salem Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council. In the complaint filed on October 19, 1987, plaintiffs alleged violations of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*; the Oregon & California Lands Act (OCLA), 43 U.S.C. § 1181; the Federal Lands Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.*; the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703 *et seq.*; and the Administrative Procedures Act (APA), 5 U.S.C. §§ 553 *et seq.*

In their first claim for relief under the NEPA, plaintiffs challenged the April 10, 1987 decision of the Director of the Bureau of Land Management (BLM) for the State of Oregon not to prepare a Supplemental Environmental Impact Statement prior to the completion of a new Environmental Impact Statement which was expected to be completed by the fall of 1990. This court concluded that there was significant new information about the ability of the northern spotted owl to survive as a species. The court found that the April 10, 1987 decision of the Director of the BLM for the State of Oregon not to prepare a Supplemental Environmental Impact Statement was "arbitrary and capricious and in violation of NEPA," but concluded that Section 314 of Pub. L. 100-446, 102 Stat. 1774, 1825 (1988) barred plaintiffs' NEPA claim. *Portland Audubon Soc'y v. Lujan*, 712 F. Supp. 1456 (D. Or. 1989).

On September 6, 1989, the United States Court of Appeals for the Ninth Circuit issued a mandate affirming this court's denial of relief to plaintiffs on their NEPA claim and reversing and remanding the other claims for further proceedings. The Court of Appeals concluded that this court had correctly held that Section 314 bars the NEPA claim of plaintiffs, but concluded that this court erred in holding that the other claims of plaintiffs were untimely. *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233 (9th Cir. 1989).

On remand, plaintiffs moved the court for summary judgment on their claims under the OCLA and the MBTA. Defendant and intervenors moved the court to dismiss the action on the grounds that Section 318 of the Department of Interior and Related Agencies Appropriations Act, 1990, Pub. L. 101-121 (October 23, 1989), required dismissal of these claims. This court granted the motions of defendant and intervenors to dismiss on the grounds that Section 318 required dismissal of these claims. The Court of Appeals for the Ninth Circuit concluded that the first sentence of Section 318 upon which this court relied in dismissing the OCLA and the MBTA claims violated the doctrine of separation of powers and reversed and remanded the case once again to this court for further proceedings consistent with the opinion of the Court of Appeals. *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990).

FINDINGS OF FACT

The date for the BLM to complete new management plans is now October 1, 1992. The 1987 decision of the

Director of the BLM for the State of Oregon not to prepare a Supplemental Environmental Impact Statement only applies to a three-year period ending in fiscal year 1990; therefore, the BLM was required to determine how to proceed for the remaining two-year period – fiscal years 1991 and 1992.

On September 25, 1990, Cy Jamison, Director of the BLM, announced that for fiscal years 1991 and 1992 the BLM would follow the conservation strategy of the Interagency Scientific Committee to Address the Conservation of the Northern Spotted Owl (ISC), chaired by Jack Ward Thomas, and would avoid all timber harvesting within any of the 749,000 acres of BLM land denoted as habitat conservation areas in the report of the ISC. The ISC was established under the authority of an agreement in August, 1988 between the National Park Service, the Forest Service, the BLM, and the Fish and Wildlife Service to develop a scientifically credible conservation strategy for the northern spotted owl. In its report, the ISC concluded that the northern spotted owl was in peril over significant portions of its range because of the loss of habitat from logging and natural disturbances. The ISC proposed a two-part conservation strategy.

The first stage of the conservation strategy proposed by the ISC was to protect adequate amounts of appropriately distributed habitat to ensure the long-term survival of the northern spotted owl. The second stage of the conservation strategy of the ISC was to research and monitor the adequacy of the strategy and to seek ways to sustain and produce suitable owl habitat in managed forests.

The only departure of the BLM from the conservation strategy of the ISC report was its decision to apply a rule, known as the "50-11-40 rule", for the management of forest lands between habitat conservation areas on an optional rather than on a mandatory basis. The 50-11-40 rule requires that each quarter township (nine square miles) of federal land have 50% of its forested land composed of trees eleven or more inches in diameter with a 40% "canopy closure" (the percentage of sky covered by trees when looking up). The BLM agreed to observe the 50-11-40 rule for much of its timber harvesting, but not for all of it.

In addition to avoiding timber sales in the habitat conservation areas proposed by the ISC report, the BLM agreed not to conduct timber sales in any of the 122 management areas identified in its 1983 agreement with the Oregon Department of Fish and Wildlife. In fiscal year 1991-92, the BLM agreed to consult with the United States Fish and Wildlife Sevice [sic] on all timber sales which may affect northern spotted owls as required under Section 7 of the Endangered Species Act, 16 U.S.C. § 1535(a)(2).

APPLICABLE STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production

of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).

CONTENTIONS OF THE PARTIES

Plaintiffs contend that they are entitled to summary judgment in their favor on their claims for relief under the NEPA and the MBTA. Plaintiffs ask the court to declare the conduct of the BLM to be in violation of the NEPA and the MBTA and to issue a permanent injunction requiring the BLM to immediately commence preparation of an Environmental Impact Statement as required by the NEPA. Plaintiffs seek an injunction prohibiting the sale of timber in the habitat of the northern spotted owl pending completion of such Environmental Impact Statement and pending the promulgation of appropriate regulations by the Secretary of the Interior governing activities under the MBTA.

Defendant, Manual Lujan, Jr., in his official capacity as Secretary of the United States Department of Interior, contends that summary judgment should be entered in his favor as to all claims in this action and that no injunction should be entered. Intervenors, the Association of O & C Counties and Benton County and the Northwest Forest Resource Council, contend that summary judgment should be entered in defendant's favor as to all claims in this action.

ANALYSIS AND RULING

National Environmental Protection Act (NEPA)

Plaintiffs argue that this court's holding in *Portland Audubon Soc'y v. Lujan*, 712 F. Supp. 1456 (D. Or. 1989), entitles them to relief on their NEPA claim. Plaintiffs point out that the BLM has not addressed in any NEPA document any of the new information about the potential extinction of the northern spotted owl, and therefore this court should order the BLM to prepare an Environmental Impact Statement.

Defendant and intervenors argue that there is no NEPA claim before this court. Defendant and intervenors explain that this court has dismissed the NEPA claim, and the Court of Appeals has affirmed that dismissal, remanding only non-NEPA claims to this court for further proceedings.

In *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233, 1242 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1470 (1990), the Court of Appeals affirmed this court's dismissal of the NEPA claim. The Court of Appeals reversed and remanded for further proceedings only the non-NEPA claims. There is no NEPA claim now before this court because the dismissal of the NEPA claim by the Court of Appeals is the law of this case.

Oregon & California Lands Act (OCLA)

In their second claim for relief, plaintiffs allege that the failure of the BLM to analyze the effect of its timber sale program on the northern spotted owl and the BLM's Forest Resource Policy Statement which precludes the

BLM from withdrawing lands otherwise suitable for commercial logging in order to provide habitat for the northern spotted owl violates the OCLA. Defendant and intervenors argue that any relief sought by plaintiffs is foreclosed by the holding in *Headwaters, Inc. v. BLM*, 914 F.2d 1174 (9th Cir. 1990) (petition for rehearing pending).

In *Headwaters*, the BLM concluded that the impacts of permitting the sale and the logging of the Wilcox Peak timber area were within the impacts anticipated by the regional Environmental Impact Statement; that the Wilcox Peak timber area did not present significant unique environmental concerns; and that, therefore, a site-specific Supplemental Environmental Impact Statement was not required. Headwaters, an environmental group, challenged the decision of the BLM not to prepare a site-specific Supplemental Environmental Impact Statement for the Wilcox Peak timber sale.

On appeal, Headwaters argued that the failure of the BLM to file a site-specific Supplemental Environmental Impact Statement violated the OCLA because the OCLA required the BLM to manage the Wilcox Peak timber area for multiple uses, including wildlife conservation, rather than just for timber production. However, in its ruling, the court explained:

> We have previously observed that "[t]he provisions of 43 U.S.C. § 1181a make it clear that the primary use of the [O & C Act] lands is for timber production to be managed in conformity with the provision of sustained yield." *O'Neal v. United States*, 814 F.2d 1285, 1287 (9th Cir. 1987); *see also Skoko v. Andrus*, 638 F.2d 1154, 1156 (9th Cir.) (Skoko) (The O & C act "provided that most of the O & C lands would henceforth be

managed for sustained-yield timber production."), *cert. denied*, 444 U.S. 927, 100 S.Ct. 266, 62 L.Ed.2d 183 (1979).

While these statements are arguably dicta, we are convinced of their accuracy. 43 U.S.C. § 1181a states that O & C Act lands

> shall be managed, except as provided in section 1181c of this title [since repealed], for permanent forest production, and *the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield* for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facil[i]ties.

(Emphasis added.) Headwaters argues that the phrase "forest production" in section 1181a encompasses not merely timber production, but also conservation values such as preserving the habitat of the northern spotted owl. However, Headwaters's proposed use – exempting certain timber resources from harvesting to serve as wildlife habitat – is inconsistent with the principle of sustained yield. As the statute clearly envisions sustained yield harvesting of O & C Act lands, we conclude that Headwaters's construction is untonable. There is no indication that Congress intended "forest" to mean anything beyond an aggregation of timber resources.

914 F.2d at 1183.

In *Headwaters*, the Ninth Circuit concluded that the OCLA does not "suggest that wildlife habitat conservation or conservation of old growth forest is a goal on a par with timber production, or indeed that it is a goal of

the O & C Act at all," contrary to the position of Headwaters that the OCLA was a multiple use statute. *Id.* at 1184.

The position of plaintiffs in this case is based upon the identical legal issues resolved against their position in the *Headwaters* case. There are no disputed factual issues in this case. *Headwaters* resolved the legal issues presented in this case under the OCLA. *Headwaters* precludes plaintiffs from the relief they seek under their second claim for relief.

Federal Lands Policy and Management Act (FLPMA)

In their third claim for relief, plaintiffs allege that the Forest Resource Policy Statement of the BLM, which precludes the BLM from withdrawing lands otherwise suitable for commercial logging in order to provide habitat for the northern spotted owl, violates the multiple-use mandate of the FLPMA. Defendant and intervenors move the court for judgment in their favor on the ground that the identical legal issue was resolved in the *Headwaters* case.

Plaintiffs argue here that their claim that the BLM failed to analyze the effect of its entire timber sale program on the northern spotted owl is materially different from the claim in *Headwaters,* which was that the Wilcox Peak Environmental Impact Statement did not address and consider a recently discovered pair of owls in the vicinity of the proposed sale. Plaintiffs assert that the decision of the court in *Headwaters* does not affect this litigation.

The FLPMA prescribes management objectives for lands in the public domain. Under the FLPMA, the BLM must make an inventory of the resource values of land in

the public domain and select "that use or combination of uses which will best achieve the objectives of multiple use." 43 C.F.R. § 1725.3-1 (1987); 43 U.S.C. § 1711(a). The BLM is directed " 'to manage the public lands on a multiple use basis making the most judicious use of the land for some or all of the public land resources and using some land for less than all of the resources, where appropriate.' " *Headwaters*, 914 F.2d at 1182, *quoting Rocky Mountain Oil and Gas Ass'n v. Watt*, 696 F.2d 734, 738 (10th Cir. 1982) (emphasis, citations, and internal quotations omitted).

In *Headwaters*, the Court of Appeals affirmed the decision of the district court that the multiple use analysis prepared by the BLM pursuant to the FLPMA adequately considered " 'all pertinent factors, including, but not limited to, ecology, existing uses, and the relative values of the various resources in particular areas.' " District Court opinion, *quoting* 43 C.F.R. § 1725.3-1 (1987). The Ninth Circuit concluded that "[t]his finding is supported by the language of the management plan and by testimony presented at trial, and is not clearly erroneous." 914 F.2d at 1182.

The trial court's finding in *Headwaters* that the BLM had complied with the requirements of the FLPMA was a factual determination based upon the application of the requirements of the FLPMA to the management plan of the BLM. The decision in *Headwaters* has no collateral estoppel effect upon the court in this case because neither party has addressed the factual issues underlying the FLPMA claim in this case. Defendant's motion for summary judgment on this claim is denied.

Migratory Bird Treaty Act (MBTA)

The MBTA provides, in part, that "[u]nless and except as permitted by regulation . . . it shall be unlawful at any time, by any means or in any manner, to . . . take, capture, kill, [or] attempt to take, capture, or kill . . . any migratory bird." The northern spotted owl is a migratory bird as defined by the regulations. 50 C.F.R. § 10.13. Plaintiffs correctly point out that, in its own documents, the BLM recognizes that the planned timber sales in the habitat of the northern spotted owl will result in the deaths of owls. The issue before the court is whether the deaths of owls, which are caused by the destruction of their habitat, violates the MBTA.

In *Seattle Audubon Soc'y v. Robertson*, No. C89-160WD (W.D. Wash. March 7, 1991), the court found that the timber management plans of the United States Forest Service did not violate the MBTA by allowing the logging of the habitat of the northern spotted owl. The court explained:

> Whether the Forest Service's timber management plan, or timber sales fashioned pursuant to it, violate MBTA depends on the interpretation of "taking." Under the regulations promulgated pursuant to MBTA, to "take" is to "pursue, hunt, shoot, wound, kill, trap, capture, or collect," or to attempt any such act. 50 C.F.R. § 10.12. Under [the Endangered Species Act (ESA)], to "take" is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). "Harm" under ESA means
>
> > an act which actually kills or injures wildlife. Such act may include significant habitat

> modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

> [Seattle Audubon Society] asks the court to engraft ESA's broader definition of a "taking" onto MBTA. It relies upon a Supreme Court case declaring protection of migratory birds to be a "national interest of very nearly the first magnitude," *State of Missouri v. Holland*, 252 U.S. 416 (1920), and another stating that ESA sheds light upon similar terms in MBTA, *Andrus v. Allard*, 444 U.S. 51, 62 (1979).
>
> But the differences between a "taking" under ESA and MBTA are distinct and purposeful. ESA, enacted in 1973, included "harass" and "harm" in the definition. Pub. L. 93-205, § 3, 87 Stat. 885. Congress amended MBTA the following year, and did not modify its prohibitions to include "harm." Pub. L. 93-300, § 1, 88 Stat. 190. It is the "harm" part of the definition that makes "significant habitat modification or degradation" illegal. The court cannot do what Congress, and the Department of Interior, did not do. The statute and regulations intended to preserve an endangered or threatened species differ from those adopted pursuant to international treaties.

Id. at 22-23.

Plaintiffs argue that the conclusion that habitat modification which leads to the deaths of protected birds does not violate the MBTA is contradicted by a number of prior court decisions, including the decision in *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (killing birds by polluting their natural habitat violated the

MBTA), and *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal. 1978), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978) (the poisoning of water that lead [sic] to the death of protected birds constitutes a killing in violation of the MBTA).

Plaintiffs argue that the express language of the MBTA that "it shall be unlawful *at any time, by any means or in any manner,* to . . . kill . . . any migratory bird," 16 U.S.C. § 703 (emphasis added), requires the conclusion that the modification of the habitat of migratory birds that leads to the death of these birds violates the MBTA.

The MBTA applies to all lands, private as well as public, and imposes serious penalties for its violations. Defendant and intervenors argue that the MBTA was intended to protect migratory birds "from . . . killing," but was not intended to protect migratory birds "from . . . killing" as a result of habitat destruction. As defendant and intervenors point out, there would have been no need to enact additional legislation to protect the habitat of migratory birds, such as the Endangered Species Act, if the position of plaintiffs was correct.

This court has considered the facts and the law and agrees with Judge Dwyer's decision in *Seattle Audubon v. United States Forest Serv.* that the MBTA was not intended to include habitat modification or degradation in its prohibitions. This court finds that defendant and intervenors are entitled to summary judgment on plaintiffs' fourth claim for relief under the MBTA. However, this court further finds that this is an important issue for which an immediate appeal would be in the interest of all involved in this lengthy litigation. There is no just reason for delay

in entering judgment on this claim, and the court will, when presented with the appropriate form of judgment under Fed. R. Civ. P. 54(b), enter a judgment so that an immediate appeal may be taken.

CONCLUSION

1) Plaintiffs' motion for summary judgment and injunctive relief (#530) is denied.

2) Defendant's second motion for summary judgment (#554) is granted as to plaintiffs' second and fourth claims for relief and denied as to plaintiffs' third claim for relief.

3) Defendant-intervenor Association of O & C Counties and Benton County's motion to strike plaintiffs' statement of undisputed facts (#571) is denied.

4) Defendant-intervenor Association of O & C Counties and Benton County's motion for partial summary judgment (#585) is granted as to plaintiffs' second and fourth claims for relief and denied as to plaintiffs' third claim for relief.

5) Defendant-intervenor Northwest Forest Resource Council's motion for summary judgment (#589) is granted as to plaintiffs' second and fourth claim for relief and denied as to plaintiffs' third claims for relief.

DATED this 8 day of May, 1991.

/s/ Helen J. Frye
HELEN J. FRYE
United States
District Judge

APPENDIX F

SIERRA CLUB
LEGAL DEFENSE FUND
OCT 10 1989

101ST CONGRESS
1st Session HOUSE OF REPRESENTATIVES

REPORT
101-264

MAKING APPROPRIATIONS FOR THE DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1990, AND FOR OTHER PURPOSES

OCTOBER 2, 1989. – Ordered to be printed

MR. YATES, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 2788]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 2788) making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1990, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its amendments numbered 17, 19, 40, 42, 46, 51, 52, 53, 65, 66, 67, 68, 69, 73, 77,

80, 89, 90, 99, 101, 103, 108, 109, 115, 116, 117, 127, 130, 147, 154, 155, 156, 157, 158, 159, 160, 161, 162, and 163.

That the House recede from its disagreement to the amendments of the Senate numbered 2, 3, 4, 5, 6, 7, 20, 29, 30, 36, 56, 74, 75, 78, 82, 119, 125, 126, 141, 148, and 151, and agree to the same.

Amendment numbered 1:

That the House recede from its disagreement to the amendment of the Senate numbered 1, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$442,084,000;* and the Senate agree to the same.

Amendment numbered 8:

That the House recede from its disagreement to the amendment of the Senate numbered 8, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$5,961,000;* and the Senate agree to the same.

Amendment numbered 9:

That the House recede from its disagreement to the amendment of the Senate numbered 9, and agree to the same with an amendment, as follows:

* * *

SEC 318. (a) From funds appropriated under this Act or otherwise made available –

(1) The Forest Service shall offer, notwithstanding the provisions of the Federal Timber Contract

Payment Modification Act of 1984 (16 U.S.C. 618(a)(5)(C)), an aggregate timber sale level of seven billion seven hundred million board feet of net merchantable timber from the national forests of Oregon and Washington for fiscal years 1989 and 1990. Such timber sales shall be consistent with existing land and resource management plans or land and resource management plans as approved except, in the case of the Mapleton Ranger District of the Siuslaw National Forest, Oregon, such sales shall be consistent with the preferred alternative of the draft land and resource management, place and accompanying draft environmental impact statement dated October 1, 1986 pending approval of a final land and resource management plan for the Siuslaw National Forest: Provided, That of the seven billion seven hundred million board foot aggregate timber sale level of fiscal years 1989 and 1990, timber sales offered from the thirteen national forests in Oregon and Washington known to contain northern spotted owls shall meet an aggregate timber sale level for fiscal years 1989 and 1990 of five billion eight hundred million board feet of net merchantable timber: Provided further, That the sales volume shall be distributed in the same proportion between Oregon and Washington national forests known to contain northern spotted owls based on the average sale volumes for fiscal years 1986 through 1988 and;

(2) The Bureau of Land Management shall offer such volumes as are required in fiscal year 1990 to meet an aggregate timber sale level of one billion nine hundred million board feet for fiscal years 1989 and 1990 from its administrative districts in western Oregon.

(b)(1) In accordance with subsection (b)(2) of this section, all timber sales from the thirteen national forests in Oregon and Washington known to contain northern spotted

owls prepared or offered pursuant to this section shall minimize fragmentation of the most ecologically significant old growth forest stands. "Old growth forest stands" are defined as those stands meeting the criteria according to Forest Service Research Publication #PNW-447. In those instances where the Forest Service, after consultation with the advisory boards established pursuant to subsection (c) of this section, determines that the definition in Forest Service Research Publication #PNW-447 is not fully applicable in national forests known to contain northern spotted owls, the Forest Service shall use old-growth definitions contained in its Pacific Northwest Regional Guide.

(2) To the extent that fragmentation of ecologically significant old growth forest stands is necessary to meet the timber sale levels directed by subsection (a)(1) of this section, the Forest Service shall minimize such fragmentation in the ecologically significant old growth forest stands on a national forest-by-national forest basis based on the Forest Service's discretion in determining the ecologically significant stands after considering input from the advisory boards created pursuant to subsection (c) of this section. The habitat of nesting pairs of spotted owls which are not in the Spotted Owl Habitat Areas (SOHAs) described in subsection (b)(3) of this section shall be considered an important factor in the identification of ecologically significant old growth forest stands.

(3) No timber sales offered pursuant to this section from the thirteen national forests in Oregon and Washington known to contain northern spotted owls may occur within SOHAs identified pursuant to the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific

Northwest Regional Guide -- Spotted Owl and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 as adjusted by this subsection:

(A) For the Olympic Peninsula Province, which includes the Olympic National Forest, SOHA size is to be 3,200 acres;

(B) For the Washington Cascades Province, which includes the Mt. Baker-Snoqualmie, Okanogan, Wenatchee, and Gifford-Pinchot National Forests, SOHA size is to be 2,600 acres;

(C) For the Oregon Cascades Province, which includes the Mt. Hood, Willamette, Rogue River, Deschutes, Winema, and Umpqua National Forests, SOHA size is to be 1,875 acres;

(D) For the Oregon Coast Range Province, which includes the Siuslaw National Forest, SOHA size is to be 2,500 acres; and

(E) For the Klamath Mountain Province, which includes the Siskiyou National Forest, SOHA size is to be 1,250 acres.

(F) All other standards and guidelines contained in the Chief's Record of Decision are adopted.

(4) In planning for the preparation and offer of timber sales authorized in subsection (a)(1) of this section, the Forest Service, to the extent possible in areas proximate to SOHA sites identified in subsection (b)(3) of this section, should exercise discretion in selecting sites and/or silvicultural prescriptions in order to retain spotted owl habitat characteristics in such areas. The Forest Service should consider the relative location and quality of such areas contiguous to the SOHAs and should give higher priority to preparing and offering sales in areas of lower quality and less important location than to

areas of greater quality and more important location relative to the SOHAs.

(5) No timber sales offered pursuant to this section on Bureau of Land Management lands in western Oregon known to contain northern spotted owls shall occur within the 110 areas identified in the December 22, 1987 agreement, except sales identified in said agreement, between the Bureau of Land Management and the Oregon Department of Fish and Wildlife. Not later than thirty days after enactment of this Act, the Bureau of Land Management, after consulting with the Oregon Department of Fish and Wildlife and the U.S. Fish and Wildlife Service to identify high priority spotted owl area sites, shall select an additional twelve spotted owl habitat areas. No timber sales may be offered in the areas identified pursuant to this subsection during fiscal year 1990.

(6)(A) Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide – Spotted Owl Guidelines and the accompanying Record of Decision, issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and

Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

(B) The Forest Service is directed to review and revise as appropriate the decision adopted in the December, 1988 Record of Decision referenced in subsection (b)(6)(A) of this section and shall consider any new information gathered subsequent to the issuance of the Record of Decision, including the interagency guidelines for conservation of northern spotted owls developed by the Interagency Scientific Committee to address conservation of the northern spotted owl. This review, and any resulting changes to the December, 1988 decision determined to be necessary by the Forest service are to be completed and in effect not later than September 30, 1990.

(c)(1) The Secretaries of Agriculture and the Interior shall name advisory boards on a national forest-by-national forest and Bureau of Land Management district-by-district basis which shall be comprised of not more than seven individuals who, in the appropriate Secretary's judgment, represent a diversity of views. In the process of selecting individuals to serve on the advisory boards, the Secretaries shall make every effort to recognize the diversity of views and perspectives and allow parties which represent a cross-section of those views to participate in making recommendations in the selection of board members, provided that every effort will be made to ensure the advisory boards are comprised of an equal number of representatives of environmental and business concerns. The advisory boards shall be named not later than thirty days after

enactment of this Act. The advisory boards shall provide recommendations to the Forest Service and the Bureau of Land Management in reviewing prospective timber sales which shall meet the timber sale levels directed by this section prior to their offer. The advisory boards shall present their advice within fifteen or forty-five days after receipt of the necessary review documents. The fifteen-day period applies to single sales and the forty-five-day period applies to multiple sales. The members of the advisory boards authorized by this section shall serve without compensation or reimbursement of expenses. The Forest Service and the Bureau of Land Management are authorized to use available funds for the services of professional, independent facilitators to assist in the work of the advisory boards.

(2) The Forest Service and Bureau of Land Management shall consider the recommendations of the advisory boards once such boards are established pursuant to this section, including any suggested modifications of individual sales. The Forest Service and Bureau of Land Management shall also consider recommendations made by the U.S. Fish and Wildlife Service on those timber sales conferred upon under Section 7(a)(4) or, if the spotted owl is listed as a threatened or endangered species, consult under Section 7(a)(2) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1536 (a)(2) and (a)(4)) prior to the offer of any subsequent timber sale in fiscal year 1990. These recommendations shall be considered regardless of whether the agreement provided in subsection (f)(1) of this section has been reached, entered into, and accepted by the relevant court. Adoption or rejection of such recommended modifications shall not require preparation of additional environmental documents, notwithstanding any other provision of law.

(d) Notwithstanding any other provision of law, there shall be not more than one level of administrative appeal of any decision by the Forest Service or the Bureau of Land Management to undertake any activity directed by this section for timber sales to be prepared, advertised, offered, and awarded during fiscal year 1990 from the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls. If an administrative stay is granted in any such appeal the Regional Forester or the Interior Board of Land Appeals shall issue a final decision on the merits within forty-five days of the date of issuance of such stay. Notwithstanding any other provision of law, any party seeking to challenge a decision made after the date of enactment of this Act to prepare, advertise, offer, or award a timber sale in fiscal year 1990 from the thirteen national forests and Bureau of Land Management lands in western Oregon known to contain northern spotted owls need not exhaust their administrative remedies prior to filing suit. Nothing in this subsection shall alter the administrative appeal requirements of the Forest Service or Bureau of Land Management.

(e) Nothing in this section shall affect interagency cooperation among the Forest Service, the Bureau of Land Management, and the U.S. Fish and Wildlife Service under Sections 7(a)(2) and 7(a)(4) of the Endangered Species Act and its regulations.

(f)(1) Not later than two days after enactment of this Act, the Forest Service shall submit to plaintiffs in the captioned case Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160, a list of sales which had been prepared for offer in fiscal year 1989 and which contain at least 40 acres of suitable spotted owl habitat. Not later than fourteen days

after receipt of such list, plaintiffs to the suit referenced in this subsection may enter into an agreement with the Forest Service releasing for sale not less than one billion one hundred million board feet of net merchantable timber. Such sales must be available for advertisement not later than fourteen days after the agreement required by this subsection is reached. Such timber sales selected shall not be subject to further judicial review by any court of the United States.

(2) If the agreement specified in subsection (f)(1) of this section is reached, then those timber sales described in the list submitted to plaintiffs pursuant to subsection (f)(1) of this section but not contained in the agreement authorized by subsection (f)(1) of this section shall not be offered for sale in fiscal year 1990.

(3) If the agreement authorized under subsection (f)(1) of this section is not implemented within the time frames prescribed in subsection (f)(1) of this section, one billion one hundred million board feet of net merchantable timber from such sales submitted to plaintiffs pursuant to subsection (f)(1) of this section shall be selected and modified as appropriate by the Forest Service in accordance with the provisions of this section. Selected sales shall be prepared, advertised, offered, awarded and operated notwithstanding any provision of law that is a basis for any stay, injunction or order issued in the proceeding identified in subsection (f)(1) of this section: Provided, That nothing in this subsection shall affect rights available under the Contract Disputes Act 41 U.S.C. 601 et seq.

(4) The Forest Service shall, for each respective timber sale, lift its own stay or apply to the appropriate court for the lifting of the restraining order or injunction whose basis has been withdrawn by this section.

(5) Timber sales selection pursuant to subsections (f)(1) or (f)(3) of this section shall be based on the following criteria: (1) proportional distribution between Oregon and Washington national forests known to contain northern spotted owls based on the average sale volumes for fiscal years 1986 through 1988; (2) proportional distribution to the extent possible among the thirteen national forests known to contain northern spotted owls in Oregon and Washington based on the average sale volumes for fiscal years 1986 through 1988; and (3) to the extent possible, selection of sales outside the habitat of nesting pairs of spotted owls which are not in the Spotted Owl Habitat Areas described in subsection (b)(3) of this section.

(g)(1) No restraining order or preliminary injunction shall be issued by any court of the United States with respect to any decision to prepare, advertise, offer, award, or operate a timber sale or timber sales in fiscal year 1990 from the thirteen national forests in Oregon and Washington known to contain northern spotted owls. The provisions of section 705 of title 5, United States Code shall not apply to any challenge to such a timber sale: Provided, That the courts shall have authority to enjoin permanently, order modification of, or void an individual sale if it has been determined by a trial on the merits that the decision to prepare, advertise, offer, award, or operate such sale was arbitrary, capricious or otherwise not in accordance with law: Provided further, That any challenge to a timber sale must be filed in Federal District Court within fifteen days of the date of initial advertisement of the challenged timber sale: Provided further, That for forty-five days after the date of filing of a challenge to a timber sale the affected agency shall take no action to award a challenged timber sale. Civil actions filed under this section shall be assigned for hearing at the earliest possible date and shall take precedence over all other matters

pending on the docket of the court at that time except for criminal cases: Provided further, That the court shall render its final decision relative to any challenge within forty-five days from the date such challenge is brought, unless the court determines that a longer period of time is required to satisfy the requirements of the United States Constitution.

(2) Notwithstanding any other provision of law, the court may set rules governing the procedures of any such proceedings which set page limits on briefs and time limits on filing briefs and motions and other actions which are shorter than the limits specified in the Federal rules of civil or appellate procedure.

(3) In order to reach a decision within forty-five days, the Federal District Court may assign all or part of any such case or cases to one or more Special Masters, for prompt review and recommendations to the court.

(h) The Forest Service, the Bureau of Land Management, and the U.S. Fish and Wildlife Service shall submit reports updating their findings and progress as determined by the process recognized under subsection (e) of this section on a monthly basis to the President of the Senate and the Speaker of the House of Representatives for appropriate referral. Such reports shall also include information on the extent to which recommendations of the advisory boards established pursuant to subsection (c) of this section were integrated into timber sale decisions as well as reasons for modifying or not adopting recommendations made by the advisory boards. Such reports shall be submitted as directed beginning on December 1, 1989, and ending on September 30, 1990.

(i) Except for provisions of subsection (a)(1) of this section, the provisions of this section apply solely to the thirteen

national forests in Oregon and Washington and Bureau of Land Management districts in western Oregon known to contain northern spotted owls. Nothing contained in this section shall be construed to require the Forest Service or Bureau of Land Management to develop similar policies on any other forest or district in Oregon or Washington.

(j) The advisory boards established under this section shall be subject to the Federal Advisory Committee Act (86 Stat. 770).

(k) Timber sales offered to meet the requirements of subsection (a) of this section shall be subject to the terms and conditions of this section for the duration of those sales contracts. All other provisions of this section shall remain in effect until September 30, 1990.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

The amendment sets terms and conditions applicable only for fiscal year 1990 for making timber sales on Federal lands in Oregon and Washington, for managing habitat for northern spotted owls, and for minimizing fragmentation of significant old growth forest stands.

The managers have agreed to this provision because a large portion of the Forest Service's and Bureau of Land Management's (BLM) fiscal year 1989 timber sale programs on the thirteen national forests in Oregon and Washington and five BLM administrative districts in western Oregon known to contain northern spotted owls have been interrupted due to legal challenges, and because these challenges have raised serious concerns

about the adequacy of planned actions of the agencies with regard to managing habitat for the northern spotted owl and minimizing fragmentation of old growth stands. The managers are extremely concerned that the agencies did not pursue avenues to resolve the conflicts or more adequately address the issues raised in these legal challenges, thereby requiring the inclusion of this section. The extraordinary measures included in this section, particularly with regard to judicial processes, have been reluctantly agreed to because of the failure of the agencies to take steps on their own to resolve these matters in a manner which could have prevented the current situation. These measures included in this provision have been provided on an interim basis for fiscal year 1990 only, during which the BLM and Forest Service are expected to take further action to address these concerns, as discussed in the Act and in this statement. Except for provisions relating to timber sale volume, this section does not apply to the six National Forests in Region Six which do not contain northern spotted owls.

In developing the amendment, the managers have sought to balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted owl and significant old growth forest stands. In reconciling these often conflicting goals, the managers have limited all provisions in this subsection to fiscal year 1990, except that the timber sales offered under this section in fiscal year 1990 are covered by its terms and conditions throughout the length of the timber sale contracts. Sales offered under this section but not awarded and withdrawn after October 1, 1990 under normal Forest Service and BLM procedures may not be

reoffered in subsequent fiscal years under the terms of this section. While it may be difficult to prepare substantial new sale volumes, the managers encourage the Forest Service to make every effort possible to prepare and offer new sales as part of the fiscal year 1990 program.

The managers have included language to ensure that the fiscal year 1990 sales volume is distributed in the same proportion between the states of Oregon and Washington, and to encourage proportional distribution of sales released through subsection (f). The managers agree that the proportional distribution should be based on the time frame of fiscal years, 1986, 1987, and 1988 to reflect an accurate historic sales time period on which to base the sales program pursuant to the provisions of this section.

The amendment provides discretion to the Forest Service in the placement of timber sales proximate to Spotted Owl Habitat Areas (SOHAs). However, as the language in the Act states, the Forest Service should give consideration to the location and quality of proximate habitat in the course of sequencing areas for timber sales, by giving priority to timber sales in areas of lesser quality prior to consideration of sales in areas of greater quality, as necessary to meet the timber targets. The agencies are also urged to give consideration in the planning, scheduling, and offering of timber sales in fiscal year 1990 to minimize, to the extent feasible, the possibility that existing spotted owl populations will become isolated.

The managers have chosen to substitute adjusted interim standards for SOHAs for national forest lands in lieu of the spotted owl management Record of Decision

(ROD) published in December, 1988. The designations contained in this section are made without prejudice to the validity of the Forest Service's ROD. However, the Forest Service is directed to review its ROD and make revisions to it as appropriate. In so doing, the Forest Service should develop documentation to support any revisions to the ROD. It is expected that the agency will give careful consideration to the recommendations of the Interagency Scientific Committee in reaching any final decisions regarding revisions to the ROD. The managers expect that the agency will make available to the Congress and the public explanations of any decisions to modify or reject such recommendations.

The legal adequacy of and prohibition against judicial review of the SOHA framework established in this section should not be construed to moot future action after fiscal year 1990 in the *Seattle Audubon Society/Washington Contract Loggers Association v. Robertson* cases against the current Forest Service owl management ROD or any cases which may be filed against a revised ROD.

The managers expect that the Forest Service shall make every reasonable effort to complete land and resource management plans by the end of the fiscal year 1990.

The managers have chosen for fiscal year 1990 to expand by 12 sites the network of SOHAs identified through the December, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife (ODFW). This expanded reservation of areas for spotted owls again is deemed adequate to address for fiscal year 1990 only the concerns raised in

the *Portland Audubon Society v. Lujan* case. The legal adequacy of and prohibition against judicial review of the SOHA framework established in this section should not be construed to moot future action after fiscal year 1990 in the *Portland Audubon Society v. Lujan* case against current BLM owl management activities or any cases which may be filed against future BLM management decisions.

The BLM shall continue to work in consultation with ODFW and the U.S. Fish and Wildlife Service to ensure that, to the extent practicable, the agencies coordinate their efforts in identifying and defining the 12 additional high priority spotted owl habitat areas.

Section (b)(6)(A) does not pass on the legal sufficiency of the existing Forest Service ROD or the BLM/ODFW agreement insofar as each addresses concerns about the northern spotted owl. However, inasmuch as subsections (b)(3) and (b)(5) establish interim SOHA standards for fiscal year 1990 which protect more habitat than currently protected by the Forest Service and BLM, subsection (b)(6)(A) removes for fiscal year 1990 the sufficiency or insufficiency of those standards as a reason for injunctive relief. These provisions do not expire for the contracts resulting from timber sales offered through September 30, 1990 and subsequently awarded under this section. Subsection (b)(6)(A) should be read in combination with subsection (g) which establishes expedited procedures for challenging timber sales in court. Together, these two subsections preserve the opportunity for judicial review of individual timber sales on a single-sale basis.

This section in no way alters application of the Endangered Species Act or other environmental laws to Forest Service and BLM management activities.

Nothing in this section is intended to prejudge any future decision with regard to the current listing process for the northern spotted owl pursuant to the Endangered Species Act, any final decisions that may be reached by a Federal court in the *Seattle Audubon/Washington Contract Loggers Assoc. v. Robertson* cases and the *Portland Audubon v. Lujan* case, any revisions that may be made by the Forest Service to the ROD or any revisions that may be made by BLM to its owl management policies. In addition, nothing in this section is intended to affect any decision by the Forest Service to offer for sale after fiscal year 1990 any timber volume which was not sold during fiscal year 1990 pursuant to subsection (f) of this section or the process by which sales are prepared and offered after fiscal year 1990.

Seven-member advisory boards are to be established to provide input on the agencies' timber sale program. The managers intend these boards to be established on a national forest-by-national forest or BLM district-by-district basis, and to be comprised of persons knowledgeable about the resource values of the particular forest or district. The boards will review timber sales and make their recommendations about which sales should be prohibited, released, or modified in furtherance of all provisions of this section, and the agencies are urged to consider fully these recommendations. The managers intend that the boards will be comprised of and will fairly represent the diverse views of the interests affected by this section.

The managers expect the advisory boards to seek to minimize conflicts involved in this issue.

The section limits administrative appeals to one level of review in each agency, and sets time limits on the resolution of appeals in cases where an action is stayed. Also, appellants need not exhaust their appeal opportunities before filing suit under the terms of this section. No other changes to the appeals process are made.

Release of 1.1 billion board feet of net merchantable timber sales prepared for the Forest Service's fiscal year 1989 program shall be achieved through either of two mechanisms: an agreement between the Forest Service and plaintiffs in the *Seattle Audubon Society* case or, in the absence of such an agreement on a timely basis, by the Forest Service. Sales prepared but not released under either of these mechanisms shall not be available as part of the fiscal year 1990 sale offer program.

The section narrows the time frame for filing civil actions in court and prohibits the issuance of pre-trial restraining orders and injunctions. It does encourage, however, that trials be scheduled and decided expeditiously.

The managers take note of the new Cedar River Municipal Watershed policies recently adopted by the City of Seattle for management of the City's 81 percent ownership of the watershed. The policies balance City land management in the Cedar River Municipal Watershed between habitat preservation and timber management. The United States owns about 18 percent of the Cedar River Municipal Watershed in the Mt. Baker-Snoqualmie National Forest. The managers note the long

history of cooperation between the City of Seattle and the Forest Service in managing the Cedar River Municipal Watershed. The City and Forest Service have agreed in the past to use land exchanges to achieve City ownership of the watershed for water quality protection. The managers note that the recently adopted City policies require comprehensive negotiations between the City and the Forest Service to achieve land and timber exchanges. The managers support this negotiation process and encourage both parties to continue to strive for expeditious agreement.

The Forest Service and BLM shall, upon request, make available within five working days timber sale environmental assessments and related documentation.

The managers are encouraged by the formation of the Interagency Scientific Committee for the purpose of developing a strategy for conservation of the northern spotted owl. The managers understand that the Committee expects to complete its recommendations by no later than June, 1990 and encourage the agencies to provide necessary support to complete expeditiously the work of the Committee. The managers expect that the recommendations and report of the Committee will be made available to the public.

The managers expect that by January 30, 1990, the BLM will provide to the appropriate committees of Congress a report explaining agency actions and intentions to coordinate and integrate spotted owl management plans on its administration districts containing spotted owls. The managers further expect that the BLM will consider carefully any recommendations made by the Interagency

Scientific Committee in the development of its new land and resource management plans.

Within 30 days of receipt, the Forest Service and BLM will make available to the public recommendations received from the Fish and Wildlife Service pursuant to actions undertaken in accordance with provisions of the Endangered Species Act.

Amendment No. 168: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate with an amendment as follows:

In lieu of the matter proposed by said amendment, insert:

Sec. 319. (a)(1) Subchapter III of chapter 13 of title 31, United States Code, is amended by adding at the end thereof the following new section:

APPENDIX G

[x] FILED [ ] ENTERED
[ ] LODGED [ ] RECEIVED

DEC 18 1990

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY ___ DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

F. DALE ROBERTSON, et al.,

Defendants.

No. C89-160WD

CONSOLIDATED WITH

No. C89-99(T)WD

ORDER ON MOTIONS HEARD DECEMBER 5, 1990

WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al.,

Plaintiffs,

v.

F. DALE ROBERTSON, et al.,

Defendants.

I.

INTRODUCTION

These consolidated cases arise from the ongoing controversy over logging in old growth national forests in Oregon and Washington. The parties are Seattle Audubon Society, et al. ("SAS"); Washington Contract Loggers Association, et al. ("WCLA"); and F. Dale Robertson, Chief of the United States Forest Service, et al. ("Forest Service"). On December 5, 1990, oral argument was heard on several motions for summary judgment and for other relief. These motions concern the legal status of several timber sales and of an administrative decision made by the Forest Service in December 1988. To understand the motions it is necessary to review the history of this litigation.

II.

HISTORY OF THESE CASES IN DISTRICT COURT AND COURT OF APPEALS

The National forests are managed by the Forest Service under the National Forest Management Act, 16 U.S.C. § 1600 *et seq.* ("NFMA"). Regulations promulgated under the NFMA require, among other things, that the agency manage habitats in the national forests to maintain viable populations of existing vertebrate species. 36 C.F.R. § 219.19 (1989). Since not every species can be monitored, "indicator species" are observed carefully as signs of general wildlife viability. *Id.* at § 219.19(a)(1). The northern spotted owl is an indicator species. While having these conservation duties, the Forest Service is also

charged with managing these lands to "provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public benefit in an environmentally sound manner." 36 C.F.R. § 219.1(a) (1989). *See generally* C. Wilkinson & H. Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1 (1985).

In recent years logging and development have steadily reduced wildlife habitat in the Pacific Northwest. At the same time many local mills have experienced log shortages. The result is an intensified struggle over the future of the national forests, and especially over the old growth remaining

The present cases began in 1989 when SAS and WCLA sued the Forest Service, challenging the legality of an administrative decision adopting standards and guidelines for managing northern spotted owl habitat in the national forests of Washington and Oregon. The administrative decision is set out in a Record of Decision ("ROD") issued on December 8, 1988, and an accompanying Final Supplement to the Environmental Impact Statement For an Amendment to the Northwest Regional Guide ("FSEIS"). For opposite reasons, the two sets of plaintiffs challenged the Forest Service's plan under the NFMA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and their implementing regulations. SAS also relied on the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. § 703, *et seq.*, and its implementing regulations.

The court consolidated the two cases, ordered them expedited, and set a final hearing date for June 13, 1989.

On March 24, 1989, the court issued a temporary injunction deferring specified timber sales in Washington and Oregon for what then appeared to be a few weeks until the final hearing. Order on Motions for Preliminary Injunction and Change of Venue at 2 (Mar. 24, 1989) (Dkt. # 97).

On May 11, 1989, the Forest Service moved for a stay of all proceedings in these cases pending completion of conference process between the Forest Service and the Fish and Wildlife Service ("FWS"). The latter agency had announced on April 25, 1989, its decision – reversing an earlier decision – to list the northern spotted owl as "threatened" under the Endangered Species Act, 16 U.S.C. § 1531 *et seq*. SAS and WCLA agreed that a stay was warranted. The Forest Service proposed a temporary ban on timber sales containing forty or more acres of spotted owl habitat. This was adopted by order of May 26, 1989. Order on Motion for Stay (May 26, 1989) (Dkt. # 173).

The Forest Service had stated its intent to present within thirty days interim measures to protect spotted owl habitat during the FWS listing process. It did not do so. Instead it moved on August 24, 1989, for leave to go forward with eleven timber sales that had been deferred. At this point there was no spotted owl management plan in effect. The court on its own motion lifted the stay and ordered an expedited final hearing in these cases. Order Lifting Stay, etc. (Sept. 12, 1989) (Dkt. # 226).

Congress in the meantime was debating legislation which would provide a short-term supply of national forest timber to mills in Washington and Oregon without

having the usual type of agency action subject to judicial review. The final result was section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989) ("Section 318"), which became law on October 23, 1989.

Section 318 includes the following provisions:

– It directs the Forest Service to offer an aggregate timber sale level of 7.7 billion board feet from the national forests of Washington and Oregon for fiscal years 1989 and 1990, of which 5.8 billion board feet were to come from the thirteen national forests in those states known to contain northern spotted owls. Subsection (a)(1).

– It directs that all timber sales in those thirteen forests "shall minimize fragmentation of the most ecologically significant old-growth forest stands" and that, if fragmentation proves necessary to meet the timber sale levels, "the Forest Service shall minimize such fragmentation in the ecologically significant old-growth forest stands on a national forest-by-national forest basis. . . ." Subsections (b)(1) and (b)(2).

– It prohibits timber sales within spotted owl habitat areas ("SOHAs") identified pursuant to the FSEIS and the ROD issued by the Forest Service on December 8, 1988, as adjusted by Congress to increase the size of protected areas, and provides: "All other standards and guidelines contained in the Chief's Record of Decision are adopted." Subsection (b)(3).

– It states that Congress "determines and directs" that management of the thirteen forests for fiscal years 1989-90 according to subsection (b)(3) "is adequate consideration for the purpose of meeting the statutory requirements that are the basis for [the present cases and a similar case pending in the district of Oregon]." Subsection (b)(6)(A).

– It provides: "The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." Subsection (b)(6)(A).

– It provides that any challenge to a 1989-90 timber sale in the thirteen forests must be filed in federal district court within fifteen days of the initial advertisement of the sale, and must be decided within forty-five days unless a longer period is required for constitutional reasons. Subsection (g)(1).

On November 6, 1989, this court vacated the preliminary injunction because section 318 had become law as to 1989-90 timber sales. The court construed the statute as a temporary amendment of the environmental laws, and therefore rejected SAS's constitutional challenge to subsection (b)(6)(A). Memorandum Decision (Nov. 14, 1989) (Dkt. # 278).

An interlocutory appeal was certified under 28 U.S.C. § 1292(b). The court of appeals declined to stay the application of section 318 pending appeal.

Over the next several months the parties proceeded under section 318. SAS brought a series of challenges to

timber sales under the standards of the temporary statute. On May 11, 1990, this court entered an order on the first such challenge, enjoining the Cowboy sale in the Umpqua National Forest. On appeal by the Forest Service, the court of appeals, affirmed in an unpublished opinion filed August 27, 1990, stating:

> [S]ection 318(b)(2) imposes restrictions on sales from these spotted owl national forests. Under Section 318(b)(2) sales may not fragment ESOG forest stands unless the fragmentation is necessary to meet the timber sales levels of Subsection (a)(1). In addition, if USFS determines that fragmentation is necessary, fragmentation must be minimized on a national forest-by-national forest level.

Seattle Audubon Soc'y v. Robertson, No. 90-35519, unpublished opinion at 2 (9th Cir. 1990).

Other challenges to 1990 timber sales followed the district court decision on the Cowboy sale. The court enjoined the Nita, South Nita, and Garden timber sales on the basis that the Forest Service had not complied with section 318. (Dkt. ## 608, 677). The Forest Service has not appealed from those rulings. The agency withdrew two other sales after a motion for summary judgment was filed. The court found for the Forest Service as to the Briggs Ridge sale in the Siskiyou National Forest. (Dkt. # 459). SAS has not appealed from that ruling.

On September 18, 1990, the court of appeals issued an opinion finding section 318(b)(6)(A) unconstitutional under the separation of powers doctrine. On October 30, 1990, in response to a request for clarification, the court of appeals amended its opinion. *Seattle Audubon Soc'y v.*

Robertson, Nos. 90-35020, 90-80008, 90-35120, slip op. 13465 (9th Cir. as amended Oct. 30, 1990).

The appeal to the Ninth Circuit concerned subsection (b)(6)(A) of section 318, in which Congress "determines and directs" that management of the forests in 1989-90 according to subsection (b)(3) and (b)(5) "is adequate consideration for the purpose of meeting the statutory requirements" underlying the cases in this district and in Oregon. If Congress, instead of saying that, had said it was temporarily amending the environmental statutes, it would have achieved its goal. *Id.* at 13479-81. But the provision as worded violates the separation of powers because it tries to adjudicate rather than to legislate. *Id.* at 13479. Section 318 cannot be read as a temporary amendment or repeal of the environmental laws, even though parts of it "add additional requirements." *Id.* at 13478. Accordingly, the constitutionality rulings of this court and the District of Oregon as to subsection (b)(6)(A) were reversed. *Id.* at 13481.

The Ninth Circuit's decision does not affect the parts of section 318 that establish standards, and set a timetable for challenges, as to 1989-90 timber sales. It has no effect on the rulings made during 1990 on challenges brought under the section 318 standards. It does not conflict with the court of appeals' earlier affirmance of the order enjoining the Cowboy sale under section 318. It deals, as amended, only with the first sentence of subsection (b)(6)(A). The appellate court has declined to express an opinion as to the second sentence, which provides that the guidelines adopted by subsections (b)(3) and (b)(5) shall not be subject to judicial review. *Id.* at 13481 n. 4.

While the above-described court proceedings were taking place, federal administrative agencies took further action regarding the spotted owl. In April 1990 the Interagency Scientific Committee released its findings and recommendations in a report entitled "A Conservation Strategy for the Northern Spotted Owl." Report of the Interagency Scientific Committee to Address the Conservation of the Northern Spotted Owl, *A Conservation Strategy for the Northern Spotted Owl* (U.S.D.A., *et al.*, 1990). In June 1990 the Fish and Wildlife Service listed the owl as a threatened species under the Endangered Species Act, 16 U.S.C. 1531 *et seq. See* U.S. Fish and Wildlife Service, "Endangered and Threatened Status for the Northern Spotted Owl," 55 *Fed. Reg.* 26114 (June 26, 1990).

On September 28, 1990, the U.S. Department of Agriculture gave notice that the Forest Service was "vacating the decision contained in the December 1988 Record of Decision which amended the Regional Guide for the Pacific Northwest Region with regard to management of northern spotted owl habitat." The notice was published at 55 *Fed. Reg.*, 40412 (Oct. 3, 1990).

The present situation may thus be summarized as follows: The court of appeals has held that the first sentence of subsection (b)(6)(A) of section 318 is unconstitutional; the remainder of section 318 survives as a non-exclusive statute which this court must apply to 1990 timber sales; the December 1988 ROD as an administrative measure has been vacated; and the Forest Service has announced that any future actions affecting northern spotted owl habitat will comply with the Endangered Species Act.

III.

CROSS-MOTIONS AS TO TWELVE SALES

From the time section 318 was adopted to the date of the court of appeals decision, a period of almost a year, all challenges to 1990 timber sales were brought under the temporary statute. SAS's claim in each instance was that the Forest Service had failed to comply with section 318's requirement that it avoid or minimize fragmentation of ecologically significant old growth. This contention was upheld as to four sales and rejected as to one. No challenge was filed on the basis that the Forest Service would be violating the NFMA, NEPA, or any other general statute.

Now, in the wake of the court of appeals decision, SAS has challenged twelve proposed 1990 timber sales under NFMA, NEPA, and MBTA. The challenges were filed within the fifteen-day period required by section 318(g)(1). The Forest Service has cross-moved for summary judgment as to the same sales. The parties agree that a briefing and hearing schedule longer than forty-five days for these motions was necessary, and the court approved their schedule. (Dkt. # 674). The court finds that no genuine issue of material fact for trial is presented as to these motions. WCLA's request for an evidentiary hearing is denied as unnecessary.

The twelve sales, which have been advertised and bid on but not yet awarded, are as follows: Briggs Secret, China-Left, and Sugarloaf in the Siskiyou National Forest; Lower Sweet, Prong, Lower Bailey, and Mister Rogers in the Siuslaw National Forest; and Mocha, Syrup, Roaring

Pot, Red 90, and Marion 90 in the Willamette National Forest.

The standard of review is set out in section 318(g)(1):

> [T]he courts shall have authority to enjoin permanently, order modification of, or void an individual sale if it has been determined by a trial on the merits that the decision to prepare, advertise, offer, award, or operate such sale was arbitrary, capricious, or otherwise not in accordance with law.

A challenge may be decided on motions for summary judgment where there is no genuine issue of fact for trial. *See* Order on Cross-Motions for Summary Judgment re Cowboy Sale at 8-10 (May 11, 1990) (Dkt. # 389).

It is agreed that in advertising these sales the Forest Service has complied with the requirements of section 318 itself. Those requirements are that fragmentation of ecologically significant old growth be avoided altogether unless necessary to meet the sales quotas; that fragmentation, if any is necessary, be minimized; and that there be no logging in SOHAs. Subsections (b)(2) and (b)(3). SAS contends that the twelve sales nevertheless cannot go forward because the Forest Service has not complied with the following statutory provisions:

– The requirement of the NFMA that the Forest Service have in place "plans for units of the National Forest System" that "incorporate the standards and guidelines" required by 16 U.S.C. § 1604(c), one of which requires the agency to assure the viability of all native vertebrate species, 16 U.S.C. § 1604(g) and 36 C.F.R. § 219.19;

– The requirement of NEPA that a federal agency examine and disclose in a sufficient environmental impact statement the environmental effects of proposals for "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C); and

– The requirement of MBTA, 16 U.S.C. § 703, that anyone seeking to take or kill birds such as the northern spotted owl obtain a permit pursuant to regulations promulgated by the Fish and Wildlife Service.

The Forest Service's primary response is that these provisions do not apply to 1990 timber sales in the thirteen forests because section 318 occupies the field. Even removing the unconstitutional first sentence of subsection (b)(6)(A), the agency argues, the balance of the statute sets out a comprehensive short-term plan for timber sales which provides all the regulation that Congress intended would exist until section 318's expiration date.

The difficulty with this argument is that, while Congress unquestionably intended that result (as all parties agreed at the December 5 hearing), the court of appeals has ruled that it failed to achieve it. On September 29, 1990, this court sent a letter to the court of appeals seeking clarification of the September 18 decision. One of the questions asked was the following:

> Congress appears to have intended that Section 318's standards would preempt the field as to 1990 sales. However, the question now arises whether it achieved that, in light of the Court of Appeals September 18 decision. The issue is that: Does Section 318 contain in full the substantive standards the Forest Service must meet

> as to 1990 sales in the forests covered by the statute? Or does agency have to comply with both the requirements of Section 318 *and* any that may exist under general statutes such as the National Forest Management Act?

Letter to Clerk, Court of Appeals, at 5 (Sept. 29, 1990) (Dkt. # 609).

In response to that question the court of appeals amended its opinion to include the following passage: "Section 318 does not, by its plain language, repeal or amend the environmental laws underlying this litigation, even though some subsections *add additional requirements.*" Slip op. at 13478 (emphasis added).

The court of appeals opinion goes on to say:

> The clear effect of subsection (b)(6)(A) is to direct that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5), then the government will have done what is required under the environmental statutes [sic] involved in these cases. Thus, if the Secretary does follow subsections (b)(3) and (b)(5) by observing their limitations on owl habitat, then the Secretary will be deemed in fact to have met as well the requirements of several environmental statutes.
>
> In this way Congress, through section 318, seeks to perform functions reserved to the courts by Article III of the Constitution. For example, if the Secretary follows subsection (b)(3) and (b)(5), then the Secretary will be found to have used the "principles of multiple use and sustained yield" and the "systematic inter-disciplinary approach" mandated by the Federal Land Policy and Management Act, 43 U.S.C. § 1712(c)(1) and (2). In addition, the agency will be deemed to have included

> detailed statements of adverse environmental effects and alternatives required under NEPA, 42 U.S.C. § 4332. Also, there will have been no taking of habitat as proscribed under the Migratory Bird Treaty Act, 16 U.S.C. § 703.

Id. at 13478-79.

It would be possible to argue that, even with subsection (b)(6)(A) invalidated, the remaining parts of section 318 show a congressional intent to occupy the field as to 1990 timber sales. But the language in the statute that might support such an argument – including the provision of subsection (b)(3)(F) that "all other standards and guidelines contained in the Chief's Record of Decision are adopted" – was brought explicitly to the Ninth Circuit's attention in the September 29 letter requesting clarification. The response of the court of appeals is that section 318 does not repeal or amend any environmental law "even though some subsections add additional requirements." This is a clear holding that section 318's requirements are in addition to those imposed by the general environmental statutes, and that the latter remain fully applicable.

It is true, as the Forest Service points out, that section 318, insofar as it is a constitutional statute, must be given "such effect that no clause, sentence or word is rendered superfluous, void, contradictory, or insignificant." *Rockbridge v. Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971). The court of appeals has done that by reading the statute's requirements as supplemental to those of the general environmental statutes. Section 318 does not, under the Ninth Circuit's holding, set out a comprehensive management plan. Its prohibition on logging in SOHAs is valid

and must be observed, but to satisfy that requirement is not necessarily to satisfy the requirements of other laws such as the NFMA and NEPA.

As the now-withdrawn ROD acknowledged, the NFMA and its implementing regulations require that the Forest Service provide for diversity of plant and animal communities in order to meet overall multiple-use objectives. Population viability of native vertebrate species is an integral part of providing for animal diversity. NEPA and its implementing regulations direct procedures to insure that public officials are provided reasonable alternatives before decisions are made or actions are taken.

The Forest Service has proceeded on the assumption that the standards and guidelines of section 318 occupied the field for 1990 timber sales, and that no other environmental statutes applied. The court of appeals decision, however, requires a ruling now that compliance with the standards of section 318 does not in itself suffice to legalize the twelve challenged sales. The agency has not shown that these other requirements have been met. For these reasons, applying the court of appeals decision as amended, it must be held that the Forest Service's decision to advertise and award these twelve sales is contrary to law. An order will be issued enjoining the sales until such time as the agency shows compliance with applicable law.

In seeking to show compliance the Forest Service has leave to argue that it has complied with the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, as to these sales, and that the requirements of ESA supersede those of all other statutes. That issue is the centerpiece of recently-filed

motions which are not yet fully briefed. SAS has moved for summary judgment on its second amended complaint, contending that the Forest Service is violating NFMA, NEPA, and MBTA in regard to further logging of owl habitat. The Forest Service has cross-moved for summary judgment on the same claims. The agency argues that its duties in regard to the owl, since the species was listed as threatened, "are no longer defined by [the NFMA]; they are governed by the Endangered Species Act, 16 U.S.C. 1531 *et seq.*," and that "in no way can [the NFMA] be read as imposing upon the agency duties toward the northern spotted owl that are independent from or in addition to the detailed requirements of the Endangered Species Act." Memorandum in Support of Defendants' Motion for Summary Judgment on Second Amended Complaint at 11, 15 (Dec. 5, 1990) (Dkt. # 751). SAS takes the opposite position. By agreement of the parties the new motions have been noted for January 11, 1991. The parties should have a chance to finish briefing that issue before it is decided.

IV.

OTHER MOTIONS

The other pending motions are SAS's motion for summary judgment under NFMA, NEPA, and MBTA as to five sales that were enjoined earlier under section 318, or were withdrawn by the Forest Service, and are not currently proposed; the Forest Service's cross-motion for a ruling that the question as to the five sales is moot; SAS's motion for summary judgment that the December 1988 ROD and FSEIS (as administrative measures, not as

temporary statutory law under section 318) violate the environmental statutes; the Forest Service's cross-motion on the latter subject, asserting that no case or controversy exists because the ROD has been withdrawn; the Forest Service's motion to dismiss WCLA's complaint; and the Forest Service's motions to dismiss certain claims of SAS's second amended complaint. These motions do not involve specific currently-proposed timber sales. They raise general questions related to those involved in the motions noted for January 11, 1991, and should be decided together with the latter.

V.

ORDER

For the reasons stated, the Forest Service is enjoined from awarding the Briggs Secret, China-Left, Sugerloaf, Lower Sweet, Prong, Lower Bailey, Mister Rogers, Mocha, Syrup, Roaring Pot, Red 90, and Marion 90 sales until such time as it shows compliance with the applicable environmental statutes. In attempting to make that showing the Forest Service has leave to argue, as urged in its motion for dismissal noted for January 11, 1991, that it has complied with the ESA and that such compliance is sufficient. The other motions heard on December 5 will be decided together with those noted for January 11.

The clerk is directed to send copies of this order to all counsel of record.

Dated: December 18, 1990.

/s/ William L. Dwyer
Williams L. Dwyer
United States District Judge

Supreme Court, U.S.
FILED
JUN 19 1991
OFFICE OF THE CLERK

No. 90-1596

In the Supreme Court of the United States

OCTOBER TERM, 1990

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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In this case, the court of appeals has held an Act of Congress unconstitutional. In our petition, we show that the court of appeals' holding – that Section 318(b)(6)(A) of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 747, prescribes a rule of decision in violation of the constitutional principle of separation of powers set forth in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871) – misapprehends the statutory terms, invokes a substantially overbroad interpretation of the *Klein* decision that cannot be squared with other federal courts' applications of that precedent, and interferes with Congress's interim solution for averting a crisis to the timber industry and local

economies of the Pacific Northwest. In response, respondents seek to minimize the importance of the substantial issues presented and the waywardness of the court of appeals' decision. Respondents' efforts fall short of the mark.

1. Respondents assert that "the actual effects of the court of appeals decision on timber sales from federal lands in Washington and Oregon are inconsequential," because the decision affects "only 16 Forest Service timber sales for violations of the environmental laws." Br. in Opp. 17-18. As a result of the unfolding proceedings on remand and in the wake of this pending certiorari petition, respondents have *now* abandoned their plans to challenge any number of outstanding 1990 timber sales. See *ibid.*; Br. in Opp. App. 31a. Respondents' apparent willingness to accept the status quo regarding 1990 sales, however, should not obscure what in fact has occurred to date. The court of appeals' decision has enabled respondents to overturn at least 16 1990 sales involving more than 97 million board feet of timber. And these sales account for a not insubstantial amount of revenue for both the federal government and the timber industry representatives, namely, in excess of $30 million. See, *e.g.*, Northwest Forest Resource Council Br. 6-7. In these circumstances, this case continues to present the sort of live, justiciable controversy that calls for further review.[1]

Moreover, it bears emphasizing that the court of appeals has declared an Act of Congress unconstitutional. This

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[1] For that reason, respondents err in suggesting (Br. in Opp. 19-20) that this case mirrors the situation before the Court in *Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497 (1971), and *Sanks* v. *Georgia*, 401 U.S. 144 (1971). Here, the United States seeks review of an adverse judgment in order to overturn a decision that has concrete and substantial current consequences.

Court has long noted that "[t]he judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy." *Adkins* v. *Children's Hospital*, 261 U.S. 525, 544 (1923); see *Blodgett* v. *Holden*, 275 U.S. 142, 147-148 (1927) (opinion of Holmes, J.). The Court has therefore not hesitated to exercise its certiorari jurisdiction "to review the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). For that reason, respondents' observation that "no other appellate court is ever likely to interpret any provision of section 318, let alone address the constitutionality of subsection 318(b)(6)(A)," Br. in Opp. 21, is beside the point. The fact remains that the court of appeals has struck down a duly enacted federal law in the context of an ongoing controversy. That is precisely the sort of exercise of judicial power that—absent exceptional and rare circumstances—calls for this Court's review under 28 U.S.C. 1254(1).[2]

2. Turning to the merits of this controversy, respondents' defense of the court of appeals' application of *Klein* amounts to nothing more than quoting the court's conclusion that "Congress [cannot] prescribe a rule for the decision of a cause in a particular way[] without changing the underlying laws." Br. in Opp. 22 (brackets in original; quoting Pet. App. 16a). Such a defense is based on attacking a straw man, for as we have explained,

> Section 318(b) * * * provides the governing plans for 1990 timber sales offered by the Forest Service and

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[2] Respondents assert in passing that further review is inappropriate because "Congress has not reenacted section 318, or subsection (b)(6)(A), or any similar statutory provision." Br. in Opp. 17. But in the face of the constitutional ruling by the Ninth Circuit in this case, Congress's evident hesitancy to enact similar legislation is understandable.

> BLM in the forests at issue in respondents' pending lawsuits. * * * Those new standards, which respondents could not challenge because the final provision of Section 318(b)(6)(A) insulates them from judicial review, amounted to nothing other than a "temporary modification of the environmental laws."

Pet. 17-18 (quoting Pet. App. 25a).

Despite respondents' protestations to the contrary (see, *e.g.*, Br. in Opp. 27-29), the Ninth Circuit has thus mistakenly construed *Klein* as prohibiting Congress from enacting changes in substantive law to function as rules of decision in pending federal court actions. Indeed, respondents concede that "the outer contours of the separation of powers doctrine, and the *Klein* decision * * *, may not have been fully articulated yet." Br. in Opp. 25. That concession is not surprising, particularly where commentators agree that the *Klein* decision "is not a model of clarity." P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 369 (3d ed. 1988). Further review is therefore warranted in order to dispel the confusion among the lower courts regarding the reach of *Klein*'s constitutional proscription, a state of affairs exemplified by the decision below.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

JUNE 1991

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Supreme Court, U.S.
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JOINT APPENDIX

TODD D. TRUE
Sierra Club Legal Defense Fund
216 First Ave., South, Suite 330
Seattle, Washington 98104
(206) 343-7340
Counsel for Respondents Seattle Audubon Society, et al.

MARK C. RUTZICK
Preston Thorgrimson Shidler Gates & Ellis
111 S.W. Fifth Avenue, Suite 3200
Portland, Oregon 97204
(503) 228-3200
Counsel for Respondents Northwest Forest Resource Council, et al.

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-4061
Counsel for Petitioners

91PP

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UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON

No. 87-CV-1160

PORTLAND AUDUBON SOCIETY, ET AL.

v.

MANUEL LUJAN, ET AL.

DOCKET ENTRIES

Date	*NR*	*Proceedings*
1987		
OCT 19	1)	COMPLAINT for declaratory & inj relief
		* * * * *
DEC 18	35)	Deft's mot to dism with o/a req.
DEC 18	35a)	Memo in supp of the Secty of the Interior's mot to dism
		* * * * *
1988		
FEB 16	106)	Pltfs response to deft's mot to dism; o/a req.
		* * * * *

Date	*NR*	*Proceedings*
APR 20	132)	ORD: Mot of deft Donald Hodel to dism actn on grounds court lacks subject matter juris & ptlfs have failed to state claim for which relief can be granted GRANT s FR 4/20/88 ntfd
APR 20	133)	JUDGMENT Actn dism s FR 4/20/88 ntfd
		* * * * *
APR 21	137)	NOTC OF APPEAL Pltfs from judgment & ord 4/20/88
		* * * * *
MAY 23	143)	C/A ORD mot for emergency prelim inj deny in part & grant in part (see ord.) Appellee ord exped w/plts applts' brief file 6/15/88, appellee 6/30/88, reply 7/11/88 will be argued in SF 7/19/88, 10 am.
		* * * * *
1989		
JAN 31	149)	Pltf's renewed mot for s/j & for prelim inj OA REQ Exped consid req.
		* * * * *
FEB 3	152)	C/A ORD mandate in 88-3787, 3854, 3855 shall iss- vesting USDC with immediate juris to consid pltfs' application for inj relief. Pltfs' mot for an OSC why Bur of Land Mgmt should not be held in contempt refer to USDC. Pltfs' req c/a extend its stay Denied.

Date	*NR*	*Proceedings*
FEB 3	153)	C/A MANDATE jdgmt reversed in part, affirm in part & Remand No party recover cost ntfd

* * * * *

TERMED APPEAL

No. 87-CV-1160

PORTLAND AUDUBON SOCIETY, ET AL.

v.

MANUEL LUJAN, ET AL.

DOCKET ENTRIES

Date	*NR*	*Proceedings*
2/7/89	156	MOTION by plaintiffs for temporary restraining order & order to show cause why preliminary injunction should not issue (jp) [Entry date 2/8/89] [Edit date 2/21/89]
		* * * * *
2/8/89	165	ORDER granting motion for temporary restraining order & order to show cause why preliminary injunction should not issue [154-1] (see tro) Defts ordered to show cause why pltfs' renewed mot for prelim inj should not be granted on or before 2/17/89 at 10 am. Signed 2/8/89 microfilmed 2/10/89 Honorable Helen J. Frye (jp) [Entry date 2/10/89]
		* * * * *

Date	*NR*	*Proceedings*
2/17/89	222	RECORD OF HRG: on Pltf's renewed mot for prelim inj (1st day) Evid adduc, see separate list for witns & exhbts. ORD cont restraining ord til furth ord of court. Hrg cont to Wed, 2/22/89, 9:00 am. (ntfd c/d) Honorable Helen J. Frye (jp) [Entry date 2/24/89]
2/22/89	223	RECORD OF HRG: on pltf's renewed mot for prel inj (2nd day). Evid adduc. Hrg cont to 2/23/89, 9:00 am (ntfd c/d) Honorable Helen J. Frye (jp) [Entry date 2/24/89]
		* * * * *
2/23/89	224	RECORD OF HRG: on pltf's renewed mot for prelim inj (3rd day). Evid adduc. Court recess till 2/24/89, 9:00 am (ntfd c/d) Honorable Helen J. Frye (jp) [Entry date 2/24/89]
		* * * * *
2/24/89	229	RECORD of Prelim Inj Hrg: (4th day) Evid adduc. Iss re rebuttal witnesses taken U/A. Hrg cont to TUE, 2/28/89, 9 am. (ntfd c/d) Honorable Helen J. Frye (jp) [Entry date 2/27/89]
		* * * * *
2/28/89	232	RECORD OF HRG: On pltf's renewed mot for prelim inj (5th day). Evid adduc. Hrg adjourned. ORD extend

Date	*NR*	*Proceedings*
		TRO till court rules on the prel inj motion, (attys present) Honorable Helen J. Frye (jp) [Entry date 3/6/89]
		* * * * *
3/29/89	269	Opinion Pltfs' mot for prelim inj granted. Pltfs submit proposed ord. Mots s/j are set on court's calendar 4/24/89, 2:30 (ntfd) Signed 3/29/89 Honorable Helen J. Frye (jp) [Entry date 3/30/89]
		* * * * *
3/31/89	272	ORDER granting pltfs' motion for Preliminary Injunction (see inj) Defts Lujan et al "BLM" enjoined etc (see inj) ntfd Signed 3/31/89 microfilmed & ent 3/31/89 Honorable Helen J. Frye (jp)
		* * * * *
5/18/89	356	Opinion PAS renewed mot for s/j #149 Denied. BLM's mot s/j #161 grant. Prel inj shall be vacated & jgmt entered for BLM should prepare ap-prop docs. Signed 5/18/89 Honorable Helen J. Frye (jp)
5/18/89	357	ORDER pltfs' renewed mot for s/j #149 deneid, deft's mot for summary jgmt #161 granted. ntfd Signed 5/18/89 microfilmed & ent 5/18/89 Honorable Helen J. Frye (jp)

Date	*NR*	*Proceedings*
5/19/89	358	JUDGMENT: pltf's renewed mot for summary judgment Denied. Deft's s/j Granted The ORD grant prelim inj, which was issued by court 3/31/89, is vacated and the inj therein dissolved. Pltfs' complaint and action dismissed. ntfd Signed 5/19/89 microfilmed & ent 5/19/89 Honorable Helen J. Frye (jp)
5/19/89	359	Notice of appeal by plaintiff from Dist. Court decision [358-3] mailed info to cnsl & c/a 5/22/89 (jp) [Entry date 5/22/89]
		* * * * *
10/2/89	381	MANDATE-Judgment from US Court of Appeals 9th Circuit: affirm summary judgment fav of govt on NEPA claim & reversing and remanding pltfs' non-NEPA claims. The injunction pending appeal is vacated on the date of filing of this opinion. No party to recover costs in this court [Appeal [359-1]] (qsdr)
		* * * * *
11/3/89	394	RECORD OF ORD: granting motion to extend time to respond to pltfs' renewed mot for s/j [391-1] & [393-1]. Defts & intervenor-defts have till 11/22/89 to respond to the juridictional issues in order to resolve those matters before examination of the merits. Pltfs have till 12/6/89 to file a reply to the juris issues. OA will

Date	*NR*	*Proceedings*
		be on MON, 12/11/89, 3:00 pm only as to the juris issues. The court will not address the merits til the juris issues have been resolved. ORD deny Assn of O&C Counties, etc. motion at this time [392-1]. ORD striking date of 11/27/89 re pltf's mot for s/j [386-1]. Portions of the motion [386-1] is set for 12/11/89. (see above for time) ntfd Honorable Helen J. Frye (qsdr) [Entry date 11/8/89]
		* * * * *
11/9/89	397	MOTION by defendant Manuel Lujan to dismiss for mootness #397 (qsdr)
		* * * * *
12/11/89	416	RECORD OF HRG: defts' mots to dism #409 & 397 & pltf's renewed mot for s/j on juris iss #391. Motions are taken U/Advise except court ruled Section 318 is constitutional. ntfd. Honorable Helen J. Frye (qsdr) [Entry date 12/13/89]
		* * * * *
12/21/89	420	Opinion deft's mot to dism this action for mootnes [397] is Granted w/out prej to the filing of any new action challenging the BLM owl management activities after fiscal year 1990. Signed 11/21/89 microfilmed & eod 12/21/89 Honorable Helen J. Frye ntfd. (tely)

Date	*NR*	*Proceedings*
12/21/89	421	ORDER deft's mot to dism for mootness [397] is Granted w/out prejudice to the filing of any new action challenging the BLM owl management activities after fiscal year 1990. ntfd Signed 12/21/89 microfilmed & eod 12/21/89 Honorable Helen J. Frye (tely)
12/21/89	422	JUDGMENT: this act is dismissed w/out prejudice to the filing of any new action challenging the BLM owl management activities after fiscal year 1990. ntfd Signed 12/21/89 microfilmed & eod 12/21/89 Honorable Helen J. Frye (tely)
		* * * * *
1/30/90	456	Notice of appeal by plaintiffs from judgment entered 12/21/89 (#422) (qsdr) [Entry date 1/31/90]
		* * * * *
2/8/90	463	Opinion motion for inj pend appeal denied #428. (ntfd) Signed 2/8/90 Honorable Helen J. Frye (qsdr)
2/8/90	464	ORDER denying motion for injunction pending appeal [428-1] ntfd Signed 2/8/90 microfilmed & ent 2/8/90 Honorable Helen J. Frye (qsdr)
		* * * * *
9/26/90	493	MOTION by plaintiff for summary judgment #493-1, for permanent in-

Date	*NR*	*Proceedings*
		junction in re Hung Drury et al. Timber Sales #493-2 OA REQ (qsdr) [Entry date 10/01/90]
		* * * * *
9/28/90	492	Mandate from US Court of Appeals for the Ninth Circuit reversing decision of the District Court [Appeal [456-1] filed on 1/30/90, 90-35120 only (qsdr)
10/5/90	495	APPEAL ORDER & amended opinion on mandate #492 (app #90-35120 which was consol w/Seattle cs) Appellees' req to amd mandate construed as mot to amd opn which is granted. Opn filed 9/18/90 amd: pg 11801 of slip opn add after last sentence. The cases are remanded to Dist Courts for proceedings consistent w/this opn. This ord act as & for mandate these cases and the pend mot to recall mandate is denied. (see this ord) (qsdr)
		* * * * *
10/30/90	516	Opinion Mots to strike #499-1&2 granted. Mot to dism by certain intv's #506-1 granted. Intv's mot to stay #506-2 moot. (ntfd) Signed 10/30/90 Honorable Helen J. Frye (qsdr) [Entry date 10/31/90]
10/30/90	517	ORDER granting motion to strike [499-1] granting motion to dismiss for lack of subject matter juris [499-2] granting motion to dismiss

Date	*NR*	*Proceedings*
		[506-1] finding the motion to stay [502-2] moot. ntfd Signed 10/30/90 microfilmed & ent 10/31/90 Honorable Helen J. Frye (qsdr) [Entry date 10/31/90]
10/30/90	518	JUDGMENT: Action dism, ntfd Signed 10/30/90 microfilmed & ent 10/31/90 Honorable Helen J. Frye (qsdr) [Entry date 10/31/90]
11/9/90	519	MOTION by plaintiff to amend order and withdraw jugment [sic] #519 (qsdr) [Entry date 11/13/90)
		* * * * *
12/20/90	528	RECORD OF ORD: granting motion to amend order and withdraw jugment [sic] [519-1] ORD of court filed 10/30/90 vacated. and jgmt entered 10/30/90 vacated. Pltfs submit legal memo addressing issues of what clms remain to be litigated in this action & how those clms should be resolved by 1/4/91. Defts & intvs respond before 1/25/91 & pltf rply 2/1/91. Court will resolve issue of what clms remain & how those clms should be resolved. ntfd Honorable Helen J. Frye (qsdr)
1/3/91	530	MOTION by plaintiff for summary judgment and injunctive relief #530 OA REQ (qsdr) [Entry date 01/07/91]
		* * * * *

Date	*NR*	*Proceedings*
5/8/91	635	Opinion (see following ord same day) Signed 5/8/91 Honorable Helen J. Frye (qsdr)
5/8/91	636	ORDER Pltfs' mot for s/j & inj relief #530 denied. Deft's 2nd mot for s/j #554 granted as to pltfs' 2 & 4th clms for relief & denied as to pltfs' 3d clm for relief. Intvd Assoc of O&C & Benton County's mot to strike pltfs' stmt of undisputed facts #571 Denied. Intvd Assoc O&C & Benton County's mot for part s/j #585 granted as to pltfs' 2nd & 4th clms for relief & denied as to pltfs' 3rd clm for relief. Intvd NW Forest Resource Cncl's mot for s/j #589 granted as to pltfs' 2nd & 4th clms for relief & denied as to pltfs' 3d clm for relief. ntfd Signed 5/8/91 microfilmed & ent 5/8/91 Honorable Helen J. Frye (qsdr)
		* * * * *
5/23/91	639	MOTION by plaintiff for leave to file amended complaint #639 (qsdr)
		* * * * *
6/19/91	649	NOTICE OF APPEAL to Court of Appeals by plaintiff from order 5/8/91 #636 (qsdr) [Entry date 06/24/91]
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. 89-CV-160

SEATTLE AUDUBON SOCIETY, ET AL.

v.

ROBERTSON, ET AL.

DOCKET ENTRIES

Date	*NR*	*Proceedings*
2/8/89	1	COMPLAINT for declaratory & injunctive relief (Summons issued) (#156661) (ph) [Entry date 2/9/89]
2/9/89	2	MOTION by plaintiffs for preliminary injunction noted for 2/24/89 oral argument requested (ph) [Entry date 2/10/89]
		* * * * *
2/10/89	12	STIPULATION by defendants re award of certain timber sales (ph) [Entry date 2/13/89 [2:89cv160]
2/13/89	13	MOTION by defendant to change venue, and for stay of action on pltfs mtn for prelim inj noted for 3/3/89

Date	*NR*	*Proceedings*
		(ph) [Entry date 2/14/89] [2:89cv160]
		* * * * *
2/28/91	51	STIPULATION of defts re award of certain timber sales (ph) [Entry date 3/1/89] [2:89cv160]
		* * * * *
3/17/89	79	ORDER by Judge William L. Dwyer granting motion for temporary restraining order & order to show cause why prelim inj should not issue. setting hrg on motion for preliminary injunction, for 3:00 pm on 3/23/89 (cc: all counsel) (ph) [Entry date 3/21/89]
		* * * * *
3/23/89	99	MINUTE ENTRY: WLD; Dep Clerk: ES; CR: Vern Sorenson Oral arg on mtn for prelim inj. After oral arg, court grants pltfs mtn for prelim inj. Oral mtn by WCLA for change of venue is denied. Order to be issued. Final hrg set for 6/13/89 at 9:30 am. (ph) [Entry date 3/28/89]
3/24/89	97	ORDER by Judge William L. Dwyer granting pltfs renewed motion for preliminary injunction; denying change of venue; (cc: all counsel), Final hrg set for 9:30 on 6/13/89 (ph)
		* * * * *

Date	*NR*	*Proceedings*
3/27/89	100	TRANSCRIPT FILED—of oral decision of 3/23/89. CC all counsel. (ph) [Entry date 3/28/89]
3/27/89	101	SCHEDULING ORDER by Judge William L. Dwyer—defts answers due 4/10/89; designation of experts 4/10/89; designation & production of admin record 4/25/89; cnsl to confer & resolve scope of disc 4/10-4/12/89; briefs re scope of disc or of final hrg 4/14/89 by noon; conf w/ court if needed 4/17/89 or 4/18/89; disc 4/17-5/8/89; cross-mtns for s/j due 5/18/89; responses due 6/1/89; replies due 6/8/89; final hearing set for 6/13/89 at 9:30am (cc: all counsel) (ph) [Entry date 3/28/89]
		* * * * *
4/25/89	139	ORDER by Judge William L. Dwyer granting motion for order to add timber sales to prelim inj [114-1] ; sales listed in revised attachment A are added to list of sales subject to Order on Motions for Prelim Inj filed 3/24/89 (cc: all counsel) (ph)
		* * * * *
5/11/89	147	MOTION by defendant in 2:89-cv-00160 to stay proceedings (kh) [Entry date 5/15/89]
		* * * * *

Date	*NR*	*Proceedings*
5/18/89	161	STIPULATION and ORDER by Judge William L. Dwyer : time is shortened on dfts mtn for stay & protective order to 5/23/89 , the final evidentiary hrg is cont to 9:30 on 6/30/89, (cc: all counsel) (ph)
		* * * * *
5/26/89	173	ORDER by Judge William L. Dwyer granting motion to stay proceedings [147-1] the motion and briefing schedule is vacated, all proceedings herein are stayed until further order of the court (cc: all counsel, Judge, copies mailed out on 5/26/89) (md) [Entry date 6/1/89] [2:89cv160]
		* * * * *
8/24/89	178	MOTION by defendant in 2:89-cv-00160 for order for modification of the preliminary injunction noted for 9/8/89 (md) [2:89cv160]
8/24/89	179	NOTICE by defendant in 2:89-cv-00160 of intent to award sales (md) [2:89cv160]
		* * * * *
9/12/89	226	ORDER by Judge William L. Dwyer. The Stay of proceedings entered herein on 5/26/89 is lifted. The Forest Service's mot. to modify the prelim. injunction is consolidated with an expedited final hrg. on the merits. The final hrg will be resched-

Date	*NR*	*Proceedings*
		uled for the earliest date either in October or November, 1989. Cnsl are to file a joint scheduling proposal on or B4 9/19/89. A scheduling order will be entered following receipt of the report. The Ct. will decide in the final hrg. the issues originally raised as the spotted owl standards and guidelines set forth in the ROD. C to c, WLD. (kh) [2:89cv160]
		* * * * *
9/28/89	232	ORDER by Judge William L. Dwyer setting the following schedules: a telephone conf. of cnsl and the Ct. will be held @12:00 noon on 10/5/89 to review what discov. issues still need to be resolved. All discov. will be completed by 10/27/89. Any additional mots. will be filed by 10/5/89. On 10/19/89 the parties are to file descriptions of evidence that they intend to offer at the final hrg. On 10/30/89 @8:30 a.m. a pre-hrg. conf. will be held. On 11/6/89 the parties shall file lists of the exhibs. that they intend to offer. Final hrg briefs will be due on 11/8/89. By 8:30 a.m. on 11/13/89 cnsl will deliver to Clerk's office a list of all exhibs. to be offered to which no party objects. The final hrg. will be on

Date	*NR*	*Proceedings*
		11/13/89 @9:30 a.m. (cc: all counsel) (kh) [Entry date 9/29/89] [2:89cv160]
		* * * * *
10/19/89	257	MINUTE ORDER: * * * By close of business of 10/26/89, the parties are to file briefs stating their positions regarding the effect on these consolidated cases of the new legislation and the steps that should now be taken in these cases. Reply briefs will be due by Nov 2, 1989.
		* * * * *
11/6/89	277	ORDER by Judge William L. Dwyer Determining Section 318(b)(96)(A) of Act to be constitutional; a memorandum decision in regard to constitutionality will follow. The preliminary injunction entered in this action is hereby VACATED, and the parties will proceed in accordance with section 318. It would be untimely to hold a hrg at this point and the November 13, 1989 hearing date is hereby VACATED. A separate order will follow on whether the Ct. should now dismiss these cases or retain jurisdiction. See order for further details. (cc: all counsel) (kh) [Entry date 11/7/89]

Date	*NR*	*Proceedings*
11/14/89	278	ORDER by Judge William L. Dwyer; memorandum decision re constitutionality and retention of jurisdiction, the case will not be dismissed and the court will retain jurisdiction. A general stay of proceedings is not necessary or desirable. However, further discovery will be taken only by leave of court. (cc: all counsel) (md)
12/14/89	279	MOTION by plaintiff in 2:89-cv-00160 to stay pending appeal noted for 12/29/89 (md) [Entry date 12/15/89]
		* * * * *
12/22/89	286	MOTION by plaintiff Seattle Audubon Soci in 2:89-cv-00160 for order certifying the constitutionality of section 318(b)(6)(A) for interlocutory appeal noted for 1/12/90 (md) [Entry date 1/2/90]
		* * * * *
1/5/90	293	ORDER by Judge William L. Dwyer granting motion for order certifying the constitutionality of section 318(b)(6)(A) for interlocutory appeal [286-1] denying motion to stay pending appeal [286-1] denying motion to stay pending appeal [279-1] (cc: all counsel) (md)
1/5/90	299	NOTICE OF APPEAL by plaintiff Siuslaw Task Force in 2:89-cv-00160, plaintiff Oregon Natural Resou in 2:89-cv-00160, plaintiff Lane County

Date	*NR*	*Proceedings*
		Audubon in 2:89-cv-00160, plaintiff Portland Audubon Soc in 2:89-cv-00160, plaintiff Washington Native Pl in 2:89-cv-00160, plaintiff Pilchuck Audubon Soc in 2:89-cv-00160, plaintiff Washington Environment in 2:89-cv-00160, plaintiff Seattle Audubon Soci in 2:89-cv-00160, plaintiff Seattle Audubon Soci in 2:89-cv-00160 from Dist. Court decision entered 11/7/89 determining section 318(b)(96)(A) to be constitutional vacating the prelim. inj., and vacating hearing date of 11/13/89. [277-5] (cc: WLD, CCA, all counsel) (NS) [Entry date 1/8/90]
		* * * * *
1/30/90	322	ORDER by Judge William L. Dwyer denying motion to stay [312-1] (cc: all counsel) (md) [2:89cv160]
		* * * * *
9/27/90	589	MOTION by plaintiff Seattle Audubon Society for summary judgment and permanent injunction In Re: Six Timber Sales, Oral Argument requested noted for 10/19/90 (md) [Entry date 9/28/90] [2:89cv160]]
		* * * * *
9/27/90	593	MOTION (corrected) by plaintiff for summary judgment and permanent injunction In Re: Lower Sweet et al

Date	*NR*	*Proceedings*
		Timber Sales, oral argument requested noted for 10/19/90 (md) [Entry date 9/28/90] [2:89cv160]
9/27/90	594	MOTION (Corrected) by plaintiff for summary judgment and permanent injunction in Re The Sugarloaf, RED 90 and Marion 90 Timber Sales, Oral Argument Requested noted for 10/19/90 (md) [Entry date 9/28/90] [2:89cv160]
		* * * * *
10/ 1/90	607	ORDER by Judge William L. Dwyer granting defts motion to dismis pltfs motion for sj and permanent injunction in Re Six Timber Sales [602-1], denying pltfs motion for summary judgment and permanent injunction In Re: Six Timber Sales, Oral Argument requested [589-1] (cc: all counsel) (md) [2:89cv160]
		* * * * *
10/2/90	619	NOTICE OF APPEAL by plaintiff in 2:89-cv-00160 from Dist. Court Order, entered 10/2/90, granting deft. U.S. Forest Service's motion for summary judgment re: 6 timber sales. [607-1] (cc: WLD, CCA, all counsel) (NS) [2:89cv160]
		* * * * *
11/29/90	732	SECOND MOTION by plaintiff Seattle Audubon Society for summary judg-

Date	*NR*	*Proceedings*
		ment, declaratory relief and permanent injunction, oral argument requested noted for 12/21/90 (md) [Entry date 11/30/90] [2:89cv160]
		* * * * *
12/5/90	739	MOTION by defendants for summary judgment on second amended complaint noted for 12/28/90 (md) [2:89cv160]
		* * * * *
12/18/90	757	ORDER by Judge William L. Dwyer on motions heard Dec 5, 1990. The other motions heard on Dec 5 will be decided together with those noted for 1/11/91. (cc: all counsel) (md) [Entry date 12/20/90] [2:89cv160]
		* * * * *
3/7/91	824	ORDER by Judge William L. Dwyer on motions for sj and for dismissal: the motion of SAS for sj declaring unlawful the Forest Services proposal to log northern spotted owl habitat without complying with NFMA is granted. The agency's failure to date to comply, or begin compliance, with NFMA requirements is arbitrary and capricious, and not in accordance with law. The same motion in regard to NEPA is moot since NFMA directs that the NEPA procedures be followed. The motion in regard to

Date	*NR*	*Proceedings*
		MBTA is denied since that statute in inapplicable. The Forest Service's cross-motions on the same subjects are denied in part and granted in part accordingly. SAS's motion for sj determining that the DEC 1988 ROD violates the environmental statutes is denied because the ROD has been withdrawn. The Forest Service's cross-motion for a determination that no case or controversy exists is granted, and SAS's claims seeking relief as to the now-discarded ROD are dismissed without prejudice. The Forest Service's motion to dismiss WCLA's complaint, on the ground that no case or controversy presently exists, is granted, and that complaint is dismissed without prejudice. SAS's motion for sj as to five sales that were enjoined earlier under section 318 or were withdrawn by the Forest Service and are not currently proposed is denied without prejudice because no case or controversy is now present. HEARING AS TO INJUNCTIVE RELIEF SET FOR MARCH 12, 1991 at 8:00 a.m., 20 minutes per side. (cc: all counsel) (md) [Entry date 3/8/91] [2:89cv160]

* * * * *

Date	*NR*	*Proceedings*
4/1/91	867	ORDER by Judge William L. Dwyer evidentiary hearing set for 9:00 4/30/91, and on May 1-3 and 6-9, 1991. See Order For Further Details (cc: all counsel) (md) [Entry date 4/2/91] [2:89cv160]
		* * * * *
5/21/91	922	MOTION (renewed) by plaintiff Seattle Audubon Society for summary judgment and permanent injunction re Six Timber Sales noted for 5/24/91 (md) [Entry date 5/23/91] [2:89cv160]
		* * * * *
5/23/91	937	ORDER/MEMORANDUM DECISION AND INJUNCTION by Judge William L. Dwyer, The Forest Service is enjoined to proceed diligently in compliance with NFMA, as required by the order entered on 4/1/91 and to submit to the court and have in effect by 3/5/91 revised standards and guidelines to ensure the northern spotted owl's viability, together with an environmental impact statement, as required by NFMA and its implementing regulations. The agency is directed to submit to the court by 6/15/91 a timetable for completion of the steps to meet this schedule. The Forest Service is further enjoined from auctioning or awarding any ad-

Date	*NR*	*Proceedings*
		ditional timber sales from Forest Service Regions Five and Six that would log suitable habitat for the northern spotted owl, as defined above, until the said standards and guidelines are adopted and in effect. (cc: all counsel) (md) [Entry date 5/24/91] [2:89cv160]
		* * * * *
5/24/91	952	ORDER by Judge William L. Dwyer granting SAS's motion for summary judgment in re: Six Timber Sales [938-1] The Forest Service's cross-motion for sj is denied. SAS's motion for an injunction as to the Coon Skinner and High Spud Sales is denied (cc: all counsel) (md) [Entry date 5/26/91] [2:89cv160]
		* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-35020

SEATTLE AUDUBON SOCIETY; PILCHUCK AUDUBON SOCIETY; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON NATIVE PLANT SOCIETY; OREGON NATURAL RESOURCES COUNCIL, INC.; PORTLAND AUDUBON SOCIETY; LANE COUNTY AUDUBON SOCIETY; SIUSLAW TASK FORCE, PLAINTIFFS-APPELLANTS

v.

F. DALE ROBERTSON, IN HIS OFFICIAL CAPACITY AS CHIEF, UNITED STATES FOREST SERVICE; AND UNITED STATES FOREST SERVICE, AN AGENCY OF THE UNITED STATES, DEFENDANTS-APPELLEES

DOCKET ENTRIES

Date	*Proceedings*
1/12/90	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement. setting schedule as follows: CADS due 1/26/90 for Victor M. Sher; appellant's designation of RT is due 1/16/90; appellee's designation of RT is due 1/25/90; appellant shall order tran-

Date	*Proceedings*
	script by 2/5/90; court reporter shall file transcript in DC by 3/7/90; certificate of record shall be filed by 3/14/90 ; appellant's opening brief is due 4/23/90; appellees' brief is due 5/23/90; appellants' reply brief is due 6/6/90; [90-35020] (ra) [90-35020]
1/22/90	Filed aplts' (Siuslaw Task Force, et al) emergency motion for a stay pending appeal or, [90-35020], in the alternative, for an expedited appeal; [90-35020] ; served on 1/18/90 to (CIVATT). [1704947] (jr) [90-35020]
1/24/90	Filed aplts' "Corrected Circuit Rule 27-3 Certificate"; served on 1/22/90 to (CIVATT). [90-35020] (jr) [90-35020]
1/26/90	Filed certificate of record on appeal RT filed in DC none [90-35020] (ra) [90-35020]
1/30/90	Filed aples' (US Forest Service, et al) opposition to motion for stay pending appeal; served on 1/29/90 to (CIVATT). [90-35020] (jr) [90-35020]
1/30/90	Filed Washington Contract Loggers Assoc's opposition to motion for a stay pending appeal, or in the alternative for an expedited appeal; served on 1/29/90 to (CIVATT). [90-35020] (jr) [90-35020]
1/30/90	Filed Todd D. True in 90-35020 Civil Appeals Docketing Statement served on 1/25/90 (to CONFATT) [90-35020] [90-35020] (ra) [90-35020]

Date	*Proceedings*
2/6/90	Filed order (GOODWIN, SCHROEDER, PREGERSON): Pursuant to the order entered on 2/2/89 in Portland Audubon v. Lujan, nos. 88-3787, 88-3854 and 88-3855, the appeal in Portland Audubon v. Lujan, no. 90-35120 wil be considered by this panel. The motion by the Dept. of Justice to refer no. 90-35020 and the petition under 28 USC 1292(b), no. 90-80008, to this panel is granted. Aplts' motion for emergency stay pending appeal filed in no. 90-35020 is denied. The Clerk shall consolidate no. 90-35020 with no. 90-35120, and the consolidated appeal is expedited. The CADS requirement is waived and the cases are released from the prebriefing conference program. The certificate of record shall be filed by 3/6/90. Aplts' brief shall be filed on or before 3/6/90. Aplts' reply brief, if any, shall be filed on or before 3/16/90. The parties shall be notified of a date and time for oral argument. The panel will consider the papers already filed in nos. 90-35020 and 90-80008 in addressing the merits of this consolidated appeal. The briefs in the consolidated appeal should supplement the papers already filed. The parties are advised that should the court determine that it lacks jurisdiction in no. 90-35020, and that it would be appropriate to grant the petition for permission to appeal in no. 90-80008, it may utilize the briefs filed in the consolidated appeal to

Date	*Proceedings*
	dispose of the appeal by permission without further briefing. [170494-1] [90-35020, 90-35120, 90-80008] (dmf) [90-35020 90-35120 90-80008]
2/15/90	Filed original and 15 copies Appellant Siuslaw Task Force, et al opening brief 25 pages, and five excerpts of record in 1 volumes, served on 2/13/90 [90-35020, 90-35120] (ra) [90-35020 90-35120]
2/22/90	Case released from Pre-Briefing Conference program. (tsp) [89-35844 90-35004 90-35020 90-35026 90-35036 90-35052 90-35060 90-35082]
3/6/90	Filed original and 15 copies appellee Asso. of O & C's 12 pages brief, 0 Exc. vols: ; served on 3/5/90 [90-35120, 90-35020] (dmf) [90-35020 90-35120]
3/7/90	Filed original and 15 copies appellee F. Dale Robertson, U.S. Forest Service in 90-35120, 90-35020, 29 pages brief; served on 3/7/90 [90-35120, 90-35020] (ra) [90-35020 90-35120]
3/8/90	Filed original and 15 copies appellee NFRC, Asso. of O & C in 90-35120, 90-35020's 36 pages brief, 0 Exc. vols; served on 3/6/90 [90-35120, 90-35020] (ra) [90-35020 90-35120]
	* * * * *
3/21/90	CALENDARED: San Francisco 4/3/90 10:00 a.m. Courtroom Ceremonial Ctrm. [90-35020, 90-35120, 90-80008] (dd) [90-35020 90-35120 90-80008]
	* * * * *

Date	*Proceedings*
3/26/90	Received F. Dale Robertson, et al additional citations, served on 3/23/90 (PANEL) [90-35020, 90-35120, 90-80008] (dmf) [90-35020 90-35120 90-80008]
4/3/90	ARGUED AND SUBMITTED TO: GOODWIN, SCHROEDER, PREGERSON [90-35020, 90-35120, 90-80008] (tsp) [90-35020 90-35120 90-80008]
	* * * * *
7/31/90	Received US Forest Service, et al additional citations, served on 7/27/90 (PANEL) [90-35020, 90-35120] (dmf) [90-35020 90-35120]
8/7/90	Filed aplts' (Seattle Audubon, et al) motion for a prompt disposition on these consolidated appeals; served on 8/6/90 to (panel). [1794675] [90-35020, 90-35120, 90-80008]
8/8/90	Filed Appellee NFRC, et al's opposition to motion for prompt disposition, served on 8/7/90 (PANEL) [90-35120, 90-35020, 90-80008] (dmf) [90-35020 90-35120 90-80008]
8/10/90	Filed Appellant Portland Audubon, Seattle Audubon reply to response to NFRC motion to expidite [*sic*] appeals ;served on 8/9/90 (PANEL). [90-35020, 90-35120, 90-80008] (mt) [90-35020 90-35120 90-80008]
9/18/90	FILED OPINION: REVERSED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. GOODWIN; SCHROEDER; PREGERSON,

Date	*Proceedings*
	author.) FILED AND ENTERED JUDGMENT. [90-35020, 90-35120] (ck) [90-35020 90-35120]
9/18/90	Filed, as of 1/26/90, certified record on appeal in 21 Vols. (total): 20 Clerks Rec 1 RTs (orig.) [90-35020] [90-35020] (tm) [90-35020]
9/21/90	Filed Appellant Seattle Audubon, et al's emergency motion for issuance of mandate or limited mandate. (PANEL via Civatt) [90-35020, 90-80008] ; served on 9/20/90 [1815272] (dmf) [90-35020 90-80008]
9/21/90	Received Appellee US Forest Service, et al letter dated 9/4/90 re: opposition to emergency motion for issuance of mandate; fax copy. (PANEL via Civatt) [90-35020, 90-35120, 90-80008] (dmf) [90-35020 90-35120 90-80008]
9/24/90	Filed order (GOODWIN,, SCHROEDER,, PREGERSON,): Appellants' emergency motion for issuance of the mandate is granted. Accordingly, the mandate shall issue forthwith [90-35020, 90-35120] (mt) [90-35020 90-35120]
9/24/90	MANDATE ISSUED [90-35020, 90-35120] (mt) [90-35020 90-35120]
9/24/90	[1818637] Filed in 90-35120, Original and 40 copies Appellee NFRC, Appellee Washington Contract in 90-80008 petition for rehearing with suggestion for rehearing en banc 14 p.pages, served on 9/24/90. (Rec'd in agency 9/27/90) (PANEL AND

Date	*Proceedings*
	ALL ACTIVE JUDGES) [90-35020, 90-35020, 90-35120, 90-80008] (ch) [90-35020 90-35120 90-80008]
9/24/90	Filed in 90-35120, Appellee NFRC, Appellee Washington Contract in 90-80008's opposition to emergency motion for issuance of mandate for limited mandate, served on 9/24/90t. (PANEL) [90-35120, 90-35020, 90-80008] (ch) [90-35020 90-35120 90-80008]
9/25/90	Filed Appellee Asso. of O & C and Benton Company motion opposing aplt emergency motion to issue the mandate immediate served on 9/21/90 (PANEL). [90-35120, 90-35020] (mt) [90-35020 90-35120]
9/25/90	Filed Appellee F. Dale Robertson in 90-35120 response opposing emergency motion [1815272-1] in 90-35120 served on 9/24/90 (PANEL. copy to case file with appear as a ltr., and is dated 9/21/90). [90-35020, 90-35120] (mt) [90-35020 90-35120]
9/26/90	Filed Appellee NFRC in 90-35120 emergency motion to recall the mandate. [90-35020, 90-35120] ; served on 9/25/90 (PANEL). (mt) [90-35020 90-35120]
10/1/90	Rec'd letter dated 9/28/90 from DC Judge William L. Dwyer (Seattle) requesting clarification of opinion filed 9/18/90. (PANEL) [90-35020, 90-35120, 90-80008] (dmf) [90-35020 90-35120 90-80008]

Date	*Proceedings*
10/2/90	Filed US Forest Service, F. Dale Robertson motion to recall the mandate with suggestion of en banc consideration. (PANEL & ACTIVE JUDGES) [90-35020, 90-35120, 90-80008] served on 10/1/90 [1820961] (dmf) [90-35020 90-35120 90-80008]
10/2/90	[1820964] Filed original and 40 copies Appellee US Forest Service, Appellee F. Dale Robertson petition for rehearing with suggestion for rehearing en banc (PANEL & ACTIVE JUDGES) 15 p.pages, served on 10/1/90 [90-35020, 90-35120, 90-80008] (dmf) [90-35020 90-35120 90-80008]
10/2/90	Filed order and amended opinion (Judges GOODWIN, SCHROEDER, author, PREGERSON) Aplees' request to amend this court's mandate is construed as a motion to amend our opinion. So construed the motion is granted. Our opinion filed 9/18/90 is hereby amended as follows: On page 11801 of the slip opinion, the following shall be added after the last sentence. The cases are remanded to the DC for proceedings consistent with this opinion. This order shall act as and for the mandate in these cases and the pending motion to recall the mandate is denied. (Orig. opinion id:) REVERSED [90-35020, 90-35120, 90-80008] (dmf) [90-35020 90-35120 90-80008]
10/2/90	Filed aplts' (Siuslaw Task Force, et al) opposition to emergency motion for recall of mandate and declaration of Todd True;

Date	*Proceedings*
	served on 10/2/90 to (panel). [90-35120, 90-35020, 90-80008] (jr) [90-35020 90-35120 90-80008]
10/4/90	Filed aplt's (Portland Audubon) opposition to emergency motion for recall of mandate; served on 10/2/90 to (panel). [90-35120, 90-35020, 90-80008] (jr) [90-35020 90-35120 90-80008]
10/5/90	Rec'd aplts' (Siuslaw Task Force, et al) letter dated 10/4/90 in response to Judge Dwyer's letter dated 9/28/90 to (panel). [90-35020, 90-35120, 90-80008] (jr) [90-35020 90-35120 90-80008]
10/9/90	Rec'd aplts' letter dated 10/5/90 in response to Judge Dwyer's letter to (panel). [90-35020, 90-35120, 90-80008] (jr) [90-35020 90-35120 90-80008]
10/11/90	Rec'd aple's (Washington Contract in 90-80008) letter dated 10/10/90 in response to Judge Dwyer's letter to (panel). [90-35020, 90-35120, 90-80008] (jr) [90-35020 90-35120 90-80008]
10/30/90	Filed order and amended opinion (Judges GOODWIN,, SCHROEDER, PREGERSON, author) (Orig. opinion id: [1813079-1] in 90-35020, 90-35120, [1825341-1] in 90-80008) The opinion filed 9/18/90 is amended as follows: (SEE CASEFILE FOR COMPLETE TEXT) [90-35020, 90-35120, 90-80008] (ck) [90-35020 90-35120 90-80008]

Date	*Proceedings*
12/18/90	Rcv'd from the Supreme Court a notice that the motion foor [*sic*] an extension of time in which to file a petition for writ of certiorari has been granted and is now due 2/15/91. [90-35020, 90-80008] (mt) [90-35020 90-80008]
1/16/91	Filed order (GOODWIN, SCHROEDER,, PREGERSON,): The motion for recall of the mandate and the petitions for rehearing are denied. The suggestions for rehearing en banc are rejected. in 90-35020, 90-35120 [90-35020, 90-35120, 90-80008] (mt) [90-35020 90-35120 90-80008]
	* * * * *
4/22/91	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 90-1596 filed on 4/12/91. [90-35020] (sf) [90-35020]
7/5/91	Received notice from Supreme Court, petition for certiorari GRANTED on 6/28/91 (PANEL) (sf) [90-35020]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-80008

WASHINGTON CONTRACT LOGGERS ASSOCIATIONS'S;
PLAINTIFF-APPELLEE

v.

SEATTLE AUDUBON SOCIETY; PILCHUCK AUDUBON SOCIETY; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON NATIVE PLANT SOCIETY; OREGON NATURAL RESOURCES COUNCIL, INC.; PORTLAND AUDUBON SOCIETY; LANE COUNTY AUDUBON SOCIETY; SIUSLAW TASK FORCE,
PETITIONERS

v.

F. DALE ROBERTSON, IN HIS OFFICIAL CAPACITY AS CHIEF, UNITED STATES FOREST SERVICE; AND UNITED STATES FOREST SERVICE, AN AGENCY OF THE UNITED STATES, RESPONDENTS

DOCKET ENTRIES

Date	*Proceedings*
1/17/90	RECEIVED ON 1/16/90 ORIGINAL AND 3 PETITIONS TO APPEAL PURSUANT TO RULE 1292(b); served on 1/15/90 (CIVATT) (el) [90-80008]

Date	*Proceedings*
1/30/90	Rec'd notice of appearance of Robert L. Klarquist, Esq. & Martin W. Matzen, Esq. as counsel of record for Resp, Robertson & US Forest Service. [90-80008] (ch) [90-80008]
1/30/90	Received in 90-80008, Respondent US Forest Service answer in opposition to the petition for permission to appeal (1292(b)) (CIVATT) (ch) [90-80008]
1/30/90	Filed in 90-80008, US Forest Service & F. Dale Robertson motion to hear case before same panel as case 90-35020 [90-80008] served on 1/29/90 (CIVATT) [1708954] (ch) [90-80008]
1/30/90	Filed aples' (US Forest Service, et al) opposition to motion for stay pending appeal; served on 1/29/90 to (CIVATT). [90-35020] (jr) [90-35020]
1/30/90	Filed Washington Contract Loggers Assoc's opposition to motion for a stay pending appeal, or in the alternative for an expedited appeal; served on 1/29/90 to (CIVATT). [90-35020] (jr) [90-35020]
1/30/90	Received in 90-80008, Appellee Washington Contract answer in opposition to the petition for permission to appeal (1292(b)) (CIVATT) (ch) [90-80008]
2/2/90	Received Petitioner Seattle Audubon's in 90-80008, reply memorandum in support of petition for permission to appeal, served on 2/2/90. (CIVATT) [90-80008] (ogm) [90-80008]

Date	*Proceedings*
2/6/90	Filed order (GOODWIN, SCHROEDER, PREGERSON): Pursuant to the order entered on 2/2/89 in Portland Audubon v. Lujan, nos. 88-3787, 88-3854 and 88-3855, the appeal in Portland Audubon v. Lujan, no. 90-35120 wil [*sic*] be considered by this panel. The motion by the Dept. of Justice to refer no. 90-35020 and the petition under 28 USC 1292(b), no. 90-80008, to this panel is granted. Aplts' motion for emergency stay pending appeal filed in no. 90-35020 is denied. The Clerk shall consolidate no. 90-35020 with no. 90-35120, and the consolidated appeal is expedited. The CADS requirement is waived and the cases are released from the prebriefing conference program. The certificate of record shall be filed by 3/6/90. Aplts' brief shall be filed on or before 2/13/90. Aplees' briefs shall be filed on or before 3/6/90. Aplts' reply brief, if any, shall be filed on or before 3/16/90. The parties shall be notified of a date and time for oral argument. The panel will consider the papers already filed in nos. 90-35020 and 90-80008 in addressing the merits of this consolidated appeal. The briefs in the consolidated appeal should supplement the papers already filed. The parties are advised that should the court determine that it lacks jurisdiction in no. 90-35020, and that it would be appropriate to grant the petition for permission to appeal in no. 90-80008, it may utilize the briefs filed in the consolidated appeal to

Date *Proceedings*

dispose of the appeal by permission without further briefing. [1704947-1] [90-35020, 90-35120, 90-80008] (dmf) [90-35020 90-35120 90-80008]

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-35120

PORTLAND AUDUBON SOCIETY, ET AL.

v.

MANUEL LUJAN, ET AL.

DOCKET ENTRIES

Date	*Proceedings*
2/1/90	DOCKETED CAUSE AND ENTERED APPEARANCE OF COUNSEL. [90-35120] (dmf) [90-35120]
2/6/90	Filed order (GOODWIN, SCHROEDER, PREGERSON): Pursuant to the order entered on 2/2/89 in Portland Audubon v. Lujan, nos. 88-3787, 88-3854 and 88-3855, the appeal in Portland Audubon v. Lujan, no. 90-35120 wil [*sic*] be considered by this panel. The motion by the Dept. of Justice to refer no. 90-35020 and the petition under 28 USC 1292(b), no. 90-80008, to this panel is granted. Aplts' motion for emergency stay pending appeal filed in no. 90-35020 is denied. The Clerk shall consolidate no. 90-35020 with no. 90-35120, and the consolidated appeal is expedited.

Date *Proceedings*

The CADS requirement is waived and the cases are released from the prebriefing conference program. The certificate of record shall be filed by 3/6/90. Aplts' brief shall be filed on or before 2/13/90. Aplees' briefs shall be filed on or before 3/6/90. Aplts' reply brief, if any, shall be filed on or before 3/16/90. The parties shall be notified of a date and time for oral argument. The panel will consider the papers already filed in nos. 90-35020 and 90-80008 in addressing the merits of this consolidated appeal. The briefs in the consolidated appeal should supplement the papers already filed. The parties are advised that should the court determine that it lacks jurisdiction in no. 90-35020, and that it would be appropriate to grant the petition for permission to appeal in no. 90-80008, it may utilize the briefs filed in the consolidated appeal to dispose of the appeal by permission without further briefing. [1704947-1] [90-35020, 90-35120, 90-80008] (dmf) [90-35020 90-35120 90-80008]

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. ____

PORTLAND AUDUBON SOCIETY, HEADWATERS, LANE COUNTY AUDUBON SOCIETY, OREGON NATURAL RESOURCES COUNCIL, THE WILDERNESS SOCIETY, SIERRA CLUB, INC., SISKIYOU AUDUBON SOCIETY, CENTRAL OREGON AUDUBON SOCIETY, KALMIOPSIS AUDUBON SOCIETY, UMPQUA VALLEY AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, PLAINTIFFS,

v.

DONALD HODEL, IN HIS OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR DEFENDANT.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTORY STATEMENT

1. This is an action for declaratory and injunctive relief. Plaintiffs challenge the decision of the Oregon Director of the Bureau of Land Management (BLM) to sell old-growth timber necessary for habitat for the northern spotted owl (strix occidentalis caurina) from BLM lands in the State of Oregon.

2. The action arises under and alleges violations of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, the Oregon & California Lands Act (OCLA), 43 U.S.C. § 1181, the Federal Lands Policy and

Management Act (FLPMA), 43 U.S.C. § 1701 *et seq.*, the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703 *et seq.*, and the Administrative Procedures Act (APA), 5 U.S.C. § 553 *et seq.*

3. Plaintiffs seek an order directing the defendant to halt imminent timber sales from stands older than 200 years within a 2.1 mile radius circle of known spotted owl habitat sites, including 289 sites identified on maps prepared by the BLM for analysis in the Spotted Owl Environmental Assessment (SOEA). Plaintiffs request that the proposed order remain in effect until the defendant prepares a supplementary Environmental Impact Statement (SEIS) which discloses the effects of defendant's destruction of old growth forests on spotted owl populations, and until the defendant complies with the Migratory Bird Treaty Act. Such an order is necessary to preserve the status quo, to prevent illegal agency action, and to forestall irreparable injury to the environment.

II. JURISDICTION AND VENUE

4. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question jurisdiction).

5. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e).

III. PARTIES

6. The plaintiffs in this action are:

A. Headwaters, a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters, and natural resources. Headwaters' members use the contested areas of old-growth forests on BLM lands for hiking, bird watching, photography, aesthetic enjoyment, and other recreational activity. Their use of these areas and enjoyment of the spotted owl will be

significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

B. Lane County Audubon Society (LCAS), a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters, and natural resources. LCAS's members use the contested areas of old-growth forests on BLM lands for hiking, bird watching, photography, aesthetic enjoyment, and other recreational activity. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

C. The Oregon Natural Resources Council (ONRC), a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters and natural resources. ONRC and its members use the contested areas of old-growth forests on BLM lands for hiking, bird watching, photography, aesthetic enjoyment, and other recreational activity. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

D. The Wilderness Society (TWS), a national conservation organization. TWS devotes its resources to the preservation and proper management of America's public lands. Founded in 1935, TWS is a nonprofit organization with 170,000 members. TWS has its national headquarters in Washington, D.C., and eight regional offices—in Boston, Atlanta, Denver, Phoenix, Boise, San Francisco, Seattle and Anchorage. In each region, TWS staff members organize local citizens and conservation groups to assist government officials in making land use policy decisions. The Society also monitors federal actions affecting public land management, and staff members present information to federal agencies and Congress on a

wide range of land preservation issues. TWS members reside near BLM lands in Oregon, California and Washington State, and use and recreate on such lands. TWS' and its members' use and enjoyment of such lands and owl populations occurring on such lands will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

E. The Sierra Club, Inc., a non-profit corporation organized under the laws of the State of California. The Club's principal place of business is in San Francisco, California, and other offices located throughout the nation. The Club is a national conservation organization with over 400,000 members dedicated to protecting natural resources and the environment, including old-growth forests. The Club and its members use the contested areas of old growth forests on BLM lands for hiking, bird watching, aesthetic enjoyment, and other recreational activity. Their use and enjoyment of old-growth forests on BLM lands will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

F. Siskiyou Audubon Society, a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters, and natural resources. Siskiyou Audubon Society and its members use the contested areas of old-growth forests on BLM lands for hiking, bird watching, photography, aesthetic enjoyment, and other recreational activity. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

G. Central Oregon Audubon Society, a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters, and natural resources. Central Oregon Audubon Society and

its members use the contested areas of old-growth forests on BLM lands for hiking, bird watching, photography, aesthetic enjoyment, and other recreational activity. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

H. Portland Audubon Society, a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters, and natural resources. Portland Audubon Society and its members use the contested areas of old-growth forests on BLM lands for hiking, bird watching, photography, aesthetic enjoyment, and other recreational activity. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

I. Salem Audubon Society, a non-profit organization incorporated in the State of Oregon. Salem Audubon Society and its members have a common interest in and a concern for birds and wildlife and the quality of the environment of the State of Oregon. Salem Audubon Society and its members use, live near, and recreate on BLM administered lands. They maintain an active interest in the preservation of Oregon's old-growth ecological system in general, the well-being of species dependent on such forest systems, and the state's populations of raptorial birds, including the northern spotted owl. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

J. Umpqua Valley Audubon Society, a non-profit organization incorporated in the State of Oregon. Umpqua Valley Audubon Society and its members have a common interest in and a concern for birds and wildlife and the quality of the environment of the State of Oregon.

Umpqua Valley Audubon Society and its members use, live near, and recreate on BLM administered lands. They maintain an active interest in the preservation of Oregon's old-growth ecological system in general, the well-being of species dependent on such forest systems, and the state's populations of raptorial birds, including the northern spotted owl. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

K. Kalmiopsis Audubon Society, a non-profit organization incorporated in the State of Oregon. The Kalmiopsis Audubon Society and its members have a common interest in and a concern for birds and wildlife and the quality of the environment of the State of Oregon. Kalmiopsis Audubon Society and its members use, live near and recreate on BLM administered lands. They maintain an active interest in the preservation of Oregon's old-growth ecological system in general, the well-being of species dependent on such forest systems, and the state's populations of raptorial birds, including the northern spotted owl. Their use of these areas and enjoyment of the spotted owl will be significantly and adversely affected by defendant's cutting of old-growth timber in suitable spotted owl habitat.

L. The Natural Resources Defense Council (NRDC), a national, non-profit organization dedicated to protecting and preserving the natural environment. NRDC has 55,729 members nationwide, including 1,015 members in Oregon. NRDC's members use and enjoy BLM old-growth lands for many purposes, including hiking and nature observation. Their use of these areas and enjoyment of the northern spotted owl will be significantly and adversely affected by defendant's cutting of old-growth forests in suitable spotted owl habitat.

7. The defendant in this action is the United States Secretary of the Interior, Donald Hodel. He is sued here in his official capacity as head of the agency whose actions are challenged. The Bureau of Land Management is an agency within the Department of the Interior.

IV. STATEMENT OF FACTS

8. Old-growth forests are distinctive and unique ecosystems. The most notable features of such forests are the massive Douglas-fir trees, with typical diameters of two to six feet and heights of 150 to 270 feet. Other structural features of old growth ecosystems include standing dead trees and downed logs. The structural features of old-growth forests provide important wildlife habitat, a source of nutrients for streams and saprophytic fungi, and magnificent settings for recreational pursuits of all kinds. A more detailed description of the characteristics of old-growth ecosystems is included in Exhibit A, attached. Old-growth ecosystems take at least two hundred years to develop. Once cut, they are irretrievably lost for our generation, our children's generation, and their children's generation.

9. Much of the past and on-going research regarding the old-growth forest ecosystem has focused on one of its residents, the northern spotted owl. The spotted owl is regarded by biologists as a "management indicator species," and its fate is presumed to be an indication of the fate of the entire assemblage of species dependent upon old-growth forests. The concerns regarding the risks of extinction faced by the spotted owl also apply to other wildlife species which depend upon or find their optimum habitat in old-growth forests. Exhibit A, attached.

10. Between 1979 and 1983, defendant formulated decadel Timber Management Plans (TMP's), for each of its seven western Oregon districts. Those TMP's were

accompanied by seven separate Environmental Impact Statements (EIS's). The limited information reviewed by the BLM in those EIS's indicated that the logging of old-growth forests would result in a decline in the number of spotted owls on defendant's lands in western Oregon. *See* Exhibit B, attached.

11. A number of scientific studies have been released since the time that BLM completed the EIS's for its seven western Oregon districts. These studies contain significant new information concerning the northern spotted owl. They include: (1) a status review of the northern spotted owl by the United States Fish and Wildlife Service (1982); (2) a draft supplemental EIS prepared by the United States Forest Service, analyzing the habitat requirements of the northern spotted owl (1986); (3) a study of the northern spotted owl undertaken by a Blue Ribbon panel of respected scientists for the National Audubon Society (1986); (4) an anlysis of the population demographics of the northern spotted owl by Dr. Russell Lande (1985 and 1987); and (5) a northern spotted owl analysis prepared by a team of defendant's own biologists (May 8, 1986, and January 16, 1987). In addition to these studies, a number of other research projects have generated significant new information about the northern spotted owl.

12. On March 8, 1984, Assistant Secretary of Agriculture Douglas MacCleery ordered Region VI of the Forest Service to prepare a supplemental EIS on the effects of old-growth destruction on the northern spotted owl. That decision was based on the fact that significant new information had been developed on the spotted owl since the Forest Service released its original EIS discussing the northern spotted owl on June 14, 1984. This new information included, *inter alia*, the information provided by Dr. Russell Lande. *See* Exhibit C, attached.

13. On February 3, 1987, the Oregon State Director of the BLM issued a Spotted Owl Environmental Assessment (SOEA), which purported to review the significance of new information concerning the habitat requirements of the spotted owl. The SOEA, however, did not analyze or discuss any of the new information contained in the many studies of the northern spotted owl that have been released since the completion of the district EIS's. *See* Exhibit D, attached.

14. In a Decision Notice dated April 10, 1987, the Oregon State of the BLM decided to continue logging old-growth forests as proposed in the original TMP's. The Director decided not to supplement the EIS's because he deemed the new information regarding the effects of logging old-growth on the spotted owl "not significant." *See* Exhibit E, attached. As a result of the Director's decision, old-growth forests on BLM lands in western Oregon will be logged at a rate that will foreclose defendant's ability to provide meaningful protection for the northern spotted owl and other old-growth dependent species. New resource management plans scheduled for 1990 will be too late to stop the irreversible effects of current old-growth forest destruction. *See* Exhibit F, attached.

15. On July 24, 1987, the United States Fish & Wildlife Service (USFWS) decided to formally consider the northern spotted owl for placement on the endangered species list. *See* Exhibit G, attached. In 1982, the USFWS had refused to consider the owl for listing. *See* Exhibit H, attached. The change in the USFWS position was based in part on the significant new information plaintiffs have urged defendant to consider, and the USFWS decision itself is significant "new information."

16. In March 1983, the defendant adopted a "Forest Resources Policy Statement" (FRPS). *See* Exhibit I, attached. The FRPS dictates defendant's management of

forest resources on BLM lands affected by the Oregon and California Lands Act (OCLA), 43 U.S.C. § 1181. The FRPS requires that all lands classified as suitable for timber production shall be managed for timber and wood product production, to the maximum extent possible under the law. Suitable lands can be used for purposes other than timber production only if those other uses are specifically set forth in the OCLA. Because defendant has interpreted the OCLA as not including the protection of wildlife or habitat (except as required by the Endangered Species Act), the FRPS prohibits the withdrawal of suitable timberlands to protect wildlife or habitat not specifically listed under the Endangered Species Act.

17. The Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703 *et seq.*, prohibits the killing of any migratory bird by any means or in any manner, unless under the authority and to serve the purposes of the MBTA. The MBTA effectuates the purposes of treaties between the United States and Great Britain (on behalf of Canada), Mexico and Japan, and other purposes. The northern spotted owl is a migratory bird protected by the MBTA. *See* 50 C.F.R. § 10.13.

18. Logging of old-growth forests kills northern spotted owls by destroying their habitat. Such logging is a major cause of the decline of the northern spotted owl population and is likely to lead to the ultimate extinction of the species. *See* Exhibits F, J, and K, attached.

V. ADMINISTRATIVE PROCEEDINGS

19. The Oregon State Director of the BLM issued a decision on April 10, 1987, not to prepare a supplemental EIS on the effects of destruction of old-growth forests in suitable spotted owl habitat. *See* Exhibit E, attached.

20. On June 10, 1987, plaintiffs appealed the Director's decision to the Interior Board of Land Appeals

(IBLA), and requested that the IBLA immediately stay all sales of timber from stands older than 200 years within 2.1 mile radius circles identified on maps prepared by the defendant for each of the 289 known spotted owl habitat sites analyzed in the defendant's Spotted Owl Environmental Assessment (SOEA). The stay was necessary to preserve the status quo, to prevent illegal agency action, and to prevent further irreparable injury to the environment.

21. On July 1, 1987, the IBLA denied the plaintiffs' request for stay. The Board based its denial solely on the ground that plaintiffs had failed to show a substantial threat of irreparable injury because the record was silent as to any specific proposed timber sales that would affect the spotted owl.

22. On September 4, 1987, plaintiffs filed a renewed request for stay with the IBLA. Plaintiffs attached a list of all currently planned old-growth sales that the defendant had scheduled for offer in the next three years within a 2.1 mile radius of known spotted owl habitat sites. *See* Exhibit L, attached. In addition, plaintiffs requested a stay of all planning for timber sales, including site selection and the initiation of environmental assessments, for old-growth stands as described above, unless defendant first prepared an EIS with respect to such sales.

23. Due to the immediate and irreparable effects on the northern spotted owl and old growth ecosystems of defendant's proposed sales, plaintiffs advised the IBLA that they would view the Board's failure to act on the renewed stay request within 20 days as a denial of their request. As of the date of filing this Complaint, 20 days have expired and the IBLA has failed to act on plaintiff's renewed stay request.

24. Between October 26 and December 31, 1987, defendant will offer 15 timber sales covering at least 1,151

acres of old-growth forests in known spotted owl habitat sites. These sales are the Lower Carnegie, Anchor Ranch, Wood Creek, and South Williams sales on the Medford District; Cougar Creek, King Creek, Lower Burnt Mountain, Brads Creek, and South Camas Valley on the Roseburg District; Long Bench II, White Wall II, and South fork Crab sales on the Salem District; and the Vaughn's Park sale on the Coos Bay District. *See* Exhibit L.

VI. CLAIMS FOR RELIEF

COUNT I

25. Defendant's destruction of old-growth forests within suitable northern spotted owl habitat sites constitutes a major federal action affecting the quality of the human environment under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*

26. Defendant's destruction of old-growth forests in suitable spotted owl habitat causes cumulative, synergistic, and indirect effects that have not been examined in an adequate NEPA document.

27. Significant new information regarding the habitat requirements of the northern spotted owl has been developed since the preparation of defendant's Timber Management Plan EIS's. The decision of the director of the BLM in Oregon to proceed with continued destruction of old-growth forests in suitable spotted owl habitat, without preparing a supplemental EIS which considers significant new information regarding the effects of such destruction on the northern spotted owl, violated NEPA and 40 C.F.R. § 1502.9(c) and is subject to judicial review under 5 U.S.C. §§ 702, 706(2)(D).

COUNT II

28. Defendant's Forest Resources Policy Statement precludes defendant from withdrawing lands otherwise

suitable for commercial logging in order to provide habitat for the northern spotted owl. This violates the O&C Lands Act (OCLA), 43 U.S.C. § 1181(a) and is subject to judicial review under 5 U.S.C. §§ 702, 706(2)(A).

COUNT III

29. Defendant's Forest Resources Policy Statement violates the multiple-use mandate of the Federal Lands Policy and Management Act, 43 U.S.C. § 1701 *et seq.*, and is subject to judicial review under 5 U.S.C. §§ 702, 706(2)(A).

COUNT IV

30. The destruction of old-growth forests on defendant's lands kills northern spotted owls. This violates the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703 *et seq.*, and is subject to judicial review under 5 U.S.C. §§ 702, 706(2)(A).

VII. PRAYER FOR RELIEF

31. Plaintiffs respectfully request that the Court:

A. Declare that defendant's sales of old-growth timber in suitable spotted owl habitat without a supplemental EIS examining, *inter alia*, new information on the northern spotted owl, violated NEPA and 40 C.F.R. § 1502.9(c).

B. Declare that the defendant's Forest Resources Policy Statement is contrary to the Oregon and California Lands Act and the Federal Lands Policy and Management Act.

C. Declare that sales of old-growth timber which result in the death of northern spotted owls violate the Migratory Bird Treaty Act.

D. Declare that defendant's actions as set forth above are not in accordance with law, contrary to 5 U.S.C. § 706(2)(A).

E. Declare that defendant's actions as set forth above are not in compliance with procedures required by law, contrary to 5 U.S.C. § 706(2)(D).

F. Enjoin defendant from offering the old-growth sales identified in paragraph 24, above, unless and until defendant complies with NEPA, OCLA, FLPMA, and the MBTA.

G. Enjoin defendant from offering any additional sales of old growth forest within a 2.1 mile radius of known spotted owl habitat sites unless and until defendant complies with NEPA, OCLA, FLPMA, and the MBTA.

H. Award plaintiffs their reasonable fees, costs, expenses, and disbursements associated with this litigation.

I. Grant plaintiffs such additional and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ MICHAEL AXLINE
Michael Axline

/s/ JOHN E. BONINE
John E. Bonine
Attorneys for Plaintiffs
Lane County Audubon Society,
Oregon Natural Resources Council

/s/ VICTOR M. SHER
Victor M. Sher

/s/ TODD D. TRUE

Todd D. True
Attorneys for Plaintiffs
Headwaters, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Portland Audubon Society, Salem Audubon Society, Umpqua Valley Audubon Society, Natural Resources Defense Council

Legal Interns:
Lorelei Bensel
Peter James
Richard Mietz
William Young

Dated this 19th day of October, 1987.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Civil Action No. C89-160

SEATTLE AUDUBON SOCIETY, A NON-PROFIT CORPORATION; WASHINGTON ENVIRONMENTAL COUNCIL, A NON-PROFIT CORPORATION; WASHINGTON NATIVE PLANT SOCIETY, A NON-PROFIT CORPORATION; PILCHUCK AUDUBON SOCIETY, A NON-PROFIT CORPORATION; NATIONAL AUDUBON SOCIETY, A NON-PROFIT CORPORATION; PORTLAND AUDUBON SOCIETY, A NON-PROFIT CORPORATION; LANE COUNTY AUDUBON SOCIETY, A NON-PROFIT CORPORATION; OREGON NATURAL RESOURCES COUNCIL, A NON-PROFIT CORPORATION; AND SIUSLAW TASK FORCE, A NON-PROFIT CORPORATION, PLAINTIFFS

v.

F. DALE ROBERTSON, IN HIS OFFICIAL CAPACITY AS CHIEF, UNITED STATES FOREST SERVICE; AND UNITED STATES FOREST SERVICE, AN AGENCY OF THE UNITED STATES, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

PRELIMINARY STATEMENT

1. This is an action for a declaratory judgment and injunctive relief. Plaintiffs challenge Forest Service Chief F. Dale Robertson's December 8, 1988, decision to continue logging forest habitat for the northern spotted owl for an

additional five years, even though the entire responsible scientific community agrees that the owl faces extinction from further loss of its habitat. Chief's Robertson's Record of Decision ("ROD") is attached hereto as Exhibit A.

2. This action arises under and alleges violations of the National Forest Management ACT ("NFMA"), 16 U.S.C. § 1600 *et seq.*, and its implementing regulations, 36 C.F.R. § 219 *et seq.*, the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703 and its implementing regulation, 50 C.F.R. § 10 *et seq.*, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the Administrative Procedures Act ("APA"), 5 U.S.C. § 501 *et seq.*

3. For the violations of NEPA, plaintiffs seek an order directing the Forest Service to prepare an adequate environmental impact statement for the decision to continue logging spotted owl habitat for five more years and an injunction against further sales as described in para. 6, *infra*, until the Forest Service prepares such an EIS.

4. For the violations of the NFMA and its implementing regulations, plaintiffs seek an order directing the Forest Service to prepare a regional plan which insures the long-term viability of the northern spotted owl and an injunction against further sales as described in para. 6, *infra*, until the Forest Service prepared such a plan.

5. For the violations of the MBTA, plaintiffs seek an order prohibiting defendants from taking, killing, or otherwise harming, owls and/or their habitat without first complying with the requirements of the MBTA and its implementing regulations.

6. Until the Forest Service complies with the requirements of NEPA, the NFMA and the MBTA, plaintiffs seek an injunction against the award of any contract for the sale and logging of timber from the Mount Baker-Snoqualmie, Olympic, Wenatchee, Gifford Pinchot,

Okanogan, Mt. Hood, Siuslaw, Willamette, Umpqua, Siskiyou, Rogue River, Deschutes and Winema National Forests that will log more than forty (40) acres of suitable nesting or foraging habitat for northern spotted owls.

7. This relief is necessary to preserve the status quo, to prevent illegal agency action, and to forestall irreparable injury to the environment and plaintiffs' interests.

JURISDICTION AND VENUE

8. Jurisdiction over this action is conferred by 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief); and the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*

9. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) as the cause of action arises in this district and many of the plaintiffs reside within the district.

PARTIES

10. The plaintiffs in this action are:

A. Seattle Audubon Society, a registered Washington non-profit corporation with its principal place of business in Seattle, Washington, dedicated to protecting, conserving, and enjoying Washington's wildlife and other natural resources. Seattle Audubon Society's approximately 4,500 members live in western Washington.

B. Washington Environmental Council (WEC), a registered Washington non-profit corporation with its principal place of business in Seattle, Washington, dedicated to protecting, conserving, and enjoying Washington's wildlife and other natural resources. WEC is a coalition of both organizations and individual members. WEC's members live in Washington State.

Washington Native Plant Society ("WNPS"), a registered Washington non-profit corporation dedicated to conserving and protecting Washington State's native flora

and fauna with its principal place of business in Seattle, Washington.

D. Pilchuck Audubon Society, a registered Washington non-profit corporation with its principal place of business in Everett, Washington, dedicated to protecting, conserving, and enjoying Washington's wildlife and other natural resources. Pilchuck Audubon Society's approximately 800 members live in and around Everett, Washington.

E. National Audubon Society ("NAS"), a New York non-profit corporation with its place of business in the state of Washington at 517 S. Washington, Olympia, WA 98501. NAS has approximately 500,000 members nationwide, of which about 10,000 to 12,000 reside in Washington State. NAS is an environmental organization committed to promoting, maintaining and improving environmental quality, and preserving and protecting wildlife habitat.

F. Portland Audubon Society, a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters, and natural resources. Portland Audubon Society's approximately 5,000 members live in and around Portland, Oregon.

G. Lane County Audubon Society, a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters, and natural resources. Lane County Audubon Society's members live in Lane County, Oregon.

H. The Oregon Natural Resources Council (ONRC), a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters and natural resources. ONRC's approximately 2,800 members live in Oregon.

I. The Siuslaw Task Force ("STF"), a registered Oregon non-profit corporation dedicated to protecting and conserving the Oregon Coast Range's wildlife, lands,

waters and natural resources. STF's several hundred members live in and around Oregon Coast Range.

10. Plaintiffs and their members use old-growth forests, the habitat of northern spotted owls, for birding, wildlife observation, nature photography, aesthetic enjoyment, and other recreational and educational activities. In addition, the organizations and their members derive scientific, recreational, aesthetic and conservational benefit and enjoyment from the existence in the wild of the northern spotted owl. These interests will be irreparably damaged if defendants permit the destruction by logging of northern spotted owl habitat and thus fail to preserve the owl's viability.

11. The above-described aesthetic, conservational, recreational, scientific and wildlife preservation interests of plaintiffs and their respective members, have been, are being, and, unless the relief prayed herein is granted, will continue to be adversely affected and irreparably injured by the logging of northern spotted owl habitat and the refusal of defendants to prepare an adequate plan for the protection of the northern spotted owl, as required by law.

12. The defendants in this action are:

A. F. Dale Robertson, Chief of the United States Forest Service. He is sued here in his official capacity.

B. The United States Forest Service, an agency of the United States.

FACTS

13. The northern spotted owl is an interior forest bird that uses old growth forests for foraging, roosting, and nesting. The historical range of the northern spotted owl extended throughout old-growth coniferous forests from southwestern British Columbia through western Washington and Oregon, and the Coast Range of California to the San Francisco Bay Area. The owl's current distribution is similar to its historic range to the extent that

old-growth forested habitat for the owl remains. However, the owl has already been extirpated or is uncommon in some areas, such as the Olympic Peninsula in Washington and northwestern Oregon, as a result of old-growth habitat destruction due primarily to logging and fires.

14. The northern spotted owl depends on old-growth forests for its habitat. The amount of old-growth forest has declined significantly in the past century, largely as a result of logging. Because its habitat is being destroyed by human activities, primarily logging, the owl faces a serious risk of extinction. The scientific record regarding this risk reflects the following expert opinions, among others:

a. Dr. Mark Shaffer, a U.S. Fish and Wildlife Service's expert on population viability, reviewed the best scientific data on the fate of the spotted owl and concluded:

> the most reasonable interpretation of current data and knowledge indicate continued old growth harvesting is likely to lead to the extinction of the subspecies in the foreseeable future which argues strongly for listing the subspecies threatened or endangered at this time.

Exhibit B, attached hereto.

b. A peer review of Dr. Shaffer's analysis by Dr. Michael Soule, one of the world's leading experts on species extinction, concluded:

> I completely concur with your conclusions, and the methods by which you reached them. The more one hears about *Strix occidentalis caurina,* the more concern one feels. Problems with the data base and in the models notwithstanding, and politics notwithstanding, I just can't see how a responsible biologist could reach any other conclusion than yours.

Exhibit C, attached hereto.

c. Dr. Bruce Wilcox, Director of the Center for Conservation Biology at Stanford University, and a leading expert on problems of species extinction also reviewed Dr. Shaffer's analysis. According to Dr. Wilcox:

> The data are at least sufficient to indicate that this bird is dependent on a fairly well defined habitat type, and that the amount of habitat it needs to insure a reasonable likelihood of persistence must be close to the amount currently remaining. This is the most reasonable interpretation of the existing data and its analysis. I do not believe improvements in theory and analysis will change this conclusion.
>
> Add to this, however, continued pressures on, and plans to fell additional old growth, and there is little doubt in my mind that the owl is at least at imminent risk of becoming endangered. And if this subspecies is not at least slipping toward endangerment now, by the time enough additional data are available to significantly narrow the confidence limits on the estimated requirements for viability, it most certainly will be.

Exhibit D, attached hereto.

d. Dr. Russell Lande, Associate Professor of Ecology and Evolution at the University of Chicago, has published the only analysis of the owl's risk of extinction in a peer-reviewed scientific journal. Dr. Lande concludes:

> . . . extinction will result if the old forest is reduced to less than a proportion of 0.21 of the total area in a large region. The estimated minimum habitat requirement for the population is greater than that allowed in management plans by the USDA Forest Service. . . . With continued reduction of old forest by logging, from the current proportion of about 38% to something in the range of 7% to 16% under the plan

> preferred by the Forest Service, it should be expected that . . . spotted owls will decline until the population is extirpated from the region. This analysis . . . indicates that only a plan involving preservation of the great majority of the remaining old-growth forest . . . is likely to promote long-term persistence of the northern spotted owl population.

Exhibit E, attached hereto (accompanied by peer review letters by Dr. George Barrowclough of the American Museum of Natural History and Dr. Mark Shaffer of the U.S. Fish and Wildlife Service).

e. Dr. Gordon Orians (Professor of Zoology and Environmental Studies at the University of Washington and a leading expert in avian ecology) and Dr. Paul Ehrlich (Bing Professor of Population Studies at Stanford University, author of *Extinction: The Causes and Consequences of the Disappearance of Species* and one of the world's experts on evolution and the processes of extinction) both:

> agree with Dr. Lande's assessment that past logging of old forest that provides habitat for the northern spotted owl has jeopardized the continued existence of this bird. Further harvesting of old forest increases the risk of extinction and reduces the management options available for protecting the owl.

Exhibits F and G, attached hereto.

15. There can be no question but that the spotted owl's viability is threatened as a result of habitat destruction.

16. Continued logging of owl habitat will result in deaths of or injuries to individual spotted owls and declining owl populations.

ADMINISTRATIVE HISTORY

17. In May, 1984, then Forest Service Chief R. Max Peterson adopted the Pacific Northwest Regional Guide ("Guide"), pursuant to 36 C.F.R. § 219.8. Among other things, the Guide adopted a plan for the management of northern spotted owl habitat.

18. On October 14, 1984, plaintiffs Oregon Natural Resources Council and Lane County Audubon Society (and two other conservation organizations) administratively appealed Chief Peterson's spotted owl habitat management plan ("1984 appeal"). Exhibit H, attached hereto. The 1984 appeal asserted that the Regional Guide failed "to disclose and consider the cumulative and synergistic environmental impacts of timber harvesting in Region VI old growth areas, and particularly the effects of such harvesting on the Northern Spotted Owl (Strix Occidentalis Caurina)." Exhibit H at 1.

19. On March 8, 1985, the Department of Agriculture reversed the Chief's Regional Guide decision as it related to spotted owls and remanded to the Pacific Northwest Regional Forester for preparation of a supplemental Environmental Impact Statement ("EIS") addressing alternatives for management of the owl's habitat.

20. In the summer of 1986, the Forest Service released a Draft Supplemental EIS ("DSEIS") for public comment. The Service received over 40,000 comments, including several from qualified experts and wildlife agencies. Exhibit I, attached hereto. In the summer of 1988, the Forest Service published a final Supplemental EIS ("FSEIS"). The Service again solicited public comment.

21. The scientific community and wildlife agencies uniformly criticized the Forest Service's preferred alternative in the FSEIS. For example, the U.S. Fish and Wildlife Service stated:

> The Forest Service's proposed action for owl management (regardless of which alternative may be selected) has never been field tested. There are few empirical data which indicate that the proposed "patch" or "island" concept of owl management may be successful in maintaining a viable owl population. The northern spotted owl evolved in a nearly continuous forested environment where occasional small and isolated unforested patches resulted from natural events such as fire and windfall, but few data substantiate that the species can successfully adapt to the reverse situation. The patches may be difficult to find and may provide habitat of insufficient quality or size to support successful breeding pairs of spotted owls. Current knowledge of average home range size and other life history parameters lead to questions regarding the patch-type of concept. . . .
>
> *The preferred alternative (F) may not singularly provide for an adequate amount of suitable owl habitat either during or beyond the 15-year planning period to confidently predict the continuation of a rangewide, viable owl population.*

Exhibit J at 2 (emphasis added), attached hereto.

22. Similarly, the California Department of Fish and Game commented:

> Getting right to the point, we were disappointed to see that the preferred option (Alternative F) does not provide a better guarantee for the long-term viability of Spotted Owls. We do not believe that this alternative adequately considers the current biological information nor does it provide any buffer which adequately would protect populations from known but unpredictable catastrophic losses.

Exhibit K at 1, attached hereto.

23. The Washington Department of Wildlife reiterated the theme voiced by the scientific community and wildlife agencies:

> It is our opinion, based on best available data, that implementation of Alternative F on Washington forests would likely lead to the extirpation of the northern spotted owl in Washington.

Exhibit L at 1, attached hereto.

24. On December 8, 1988, defendant Forest Service Chief F. Dale Robertson issued the ROD which adopted, with insignificant modifications, the Forest Service's Preferred Alternative (F) from the FSEIS for management of the northern spotted owl's habitat. Exhibit A.

25. The ROD claims that "planned timber harvest [pursuant to the ROD] will not so fragment the [owl's] habitat as to preclude options to increase the long-term level of protection provided in future years should new information show that is necessary." Exhibit A at 4. Nonetheless, at the end of the 5 years covered by the ROD, planned timber harvest will have reduced spotted owl habitat by at least 4.5 percent. Exhibit A at 4.

26. On January 23, 1989, plaintiffs filed an administrative NOTICE OF APPEAL of Chief Robertson's ROD. Exhibit M, attached hereto. The NOTICE OF APPEAL was filed with the Secretary of Agriculture, pursuant to 36 C.F.R. § 211.18. With the NOTICE OF APPEAL, plaintiffs filed a STATEMENT OF REASONS, incorporating substantially the arguments raised in this lawsuit. Exhibit N, attached hereto.

27. On February 3, 1989, the Secretary of Agriculture exercised his discretion not to review plaintiffs' administrative appeal. Exhibit O, attached hereto. Thus plaintiffs' administrative remedies have been exhausted.

THE FURTHER LOSS OF OWL HABITAT AUTHORIZED BY THE ROD JEOPARDIZES THE LONG-TERM VIABILITY OF THE NORTHERN SPOTTED OWL AND WILL REDUCE THE OWL'S POPULATION.

28. There is no scientifically credible basis for the ROD's assertion that the spotted owl's viability is not

jeopardized by additional habitat destruction. In fact, the most comprehensive and up-to-date analyses by leading scientists prove the opposite.

a. Mr. Daniel Doak, a doctoral candidate at the University of Washington Zoology Department and a specialist in population viability studies and the application of mathematics to ecological questions, has recently completed a study of the population viability of the northern spotted owl entitled "Spotted Owls and Old Growth Logging in the Pacific Northwest," and submitted to *Conservation Biology* for publication.

Based on this study, Mr. Doak point out:

> The critical and immediate issue is whether five additional years of logging spotted owl habitat, as proposed by the Forest Service in the ROD, threatens the owl's viability. The ROD claims that after 5 years of logging, "[s]ufficient options will remain at that time to adjust the course of managing spotted owls and their habitats." This conclusion is based on the FSEIS' viability analysis which predicts a "Very High" probability of population viability after 15 years of logging. In my expert opinion, the FSEIS' viability analysis is fundamentally flawed. *Even five more years of logging will most likely profoundly threaten the long-term viability of the spotted owl—in fact, too much owl habitat may already have been lost to ensure the owl's long-term survival.*

Exhibit P at 1-2 (emphasis added), attached hereto (submitted in support of plaintiffs' administrative appeal of the ROD). Mr. Doak concludes:

> that the owl population will decline at even current habitat amounts. That is not to say that the situation today is hopeless. Rather, *my results warn that any further loss of owl habitat will severely compromise the owl's long-term viability.*

Id. at 3 (emphasis added).

b. Mr. Doak's analysis has been reviewed by Dr. Peter Kareiva, an Associate Professor of Zoology at the University of Washington and an expert in Mathematical and Population Biology. Dr. Kareiva states that:

> In my opinion, Mr. Doak's analysis is the best and most accurate analysis yet to be made of the spotted owl's viability.

Exhibit Q at 1, attached hereto (submitted in support of plaintiffs' administrative appeal of the ROD). Further, Dr. Kareiva is of the expert opinion that "[a]lthough all of the analyses are based on incomplete data, it is becoming clear that for all plausible estimates of dispersal rules and survivorship, and further logging will greatly reduce the owl's already perilous chances for persistence." *Id.* at 2.

c. Dr. Lande concludes, with respect to the Chief's decision and the FSEIS, that

> virtually all of the remaining spotted owl habitat must be protected in order to assure with reasonable probability the long-term viability of this species. I know of no scientific basis for concluding that further habitat loss will not jeopardize the viability of owl, as the ROD and FSEIS assert. All of the available evidence is to the contrary.

Exhibit R at 4, attached hereto (submitted in support of plaintiffs' administrative appeal of the ROD).

d. Dr. Gordon Orians reviewed both Dr. Lande's and Mr. Doak's analyses. In Dr. Orians opinion

> [it] is particularly significant that both researchers, using different methodologies, reach the same conclusion—preserving essentially all the remaining owl habitat is necessary to protect the long-term viability of the spotted owl protection. That both methods

> reach the same conclusion greatly strengthens the confidence we can have in it.

Exhibit S at 4, attached hereto (submitted in support of plaintiffs' administrative appeal of the ROD). Further, Dr. Orians notes that mistakes made now can have swift and irreversible consequences. "This is *not* a situation where incremental chipping away at the owl's habitat will cause incremental declines in the owl's population." *Id.* at 4-5.

e. Dr. Andrew Dobson, Assistant Professor of Biology at the University of Rochester and an expert on the population dynamics and life history strategies of birds, commented in regard to the DSEIS:

> I very much feel that the recommendations of the report are over-optimistic in their determinations of the owl's probability of persistence. . . It also seems likely that loss of habitat, through its effects on the recruitment function of the population, will affect the numbers of owls non-linearly. Thus *proportional declines in owl numbers may occur more rapidly than proportional losses of habitat.*

Exhibit T at 1, attached hereto (submitted in support of plaintiffs' administrative appeal of the ROD). Dr. Dobson concludes that the FSEIS is similarly flawed and endorses Dr. Lande's and Mr. Doak's analyses. *Id.* at 2.

29. Dr. Paul Ehrlich concurs with Mr. Doak's, Dr. Orians and Dr. Lande's conclusions. Thus Dr. Ehrlich states:

> I believe their conclusions regarding the risks to the owl's viability are reasonable on the basis of the existing scientific data. Though additional data would be useful, the existing information is sufficient to

> conclude that the northern spotted owl faces extinction if its habitat continues to be logged.

Exhibit U at 1, attached hereto (submitted in support of plaintiffs' administrative appeal of the ROD).

30. In summary, the expert scientific consensus that the spotted owl's viability and current population levels are jeopardized by *any* further loss of habitat stands in stark contrast to Chief Robertson's unsupported and unsupportable conclusion "that sufficient options will remain at the end of the 5 year period of this decision" to ensure the owl's viability. Exhibit A at 5.

THE FSEIS VIABILITY ANALYSIS IS FATALLY FLAWED AND CANNOT BE RELIED UPON TO CONCLUDE THAT THE OWL POPULATION FACES NO RISK FROM CONTINUED HABITAT LOSS.

31. The ROD's assertion that continued owl habitat destruction poses no risks to the owl's viability is based on the FSEIS' viability analysis. Every qualified and credible scientific review of the FSEIS' viability analysis has concluded that it is fatally flawed and discloses serious biological and mathematical errors.

32. Dr. Daniel Goodman, Professor of Environmental Biology at Montana State University and an expert in population dynamics, statistics and environmental modeling, was hired by the U.S. Department of Interior in 1987 to review the Forest Service's viability analysis. At that time he characterized the analysis as "vaguely impressionistic." Dr. Goodman noted that the DSEIS

> should be rejected on procedural grounds alone. If the description of the analysis is not sufficiently complete for a reviewer to reproduce the analysis, then it simply is not reviewable, and does not constitute an

adequate justification for any decision which claims to be based on it.

Exhibit V at 11, attached hereto.

33. Dr. Goodman's assessment upon review of the Final SEIS is even less generous. He criticizes the FSEIS for, *inter alia*:

a. obscuring the relationship between habitat loss and population declines, para. 3;
b. muddling the treatment of population dynamics by using incorrect formulae and, generally, displaying a "level of expertise adequate for failing any college course in population dymanics, para. 6;
c. providing no justification for arbitrarily increasing the immature survival rate in the simulation of the stochastic demography, para. 8;
d. botching the modeling of variation in life history parameters used in the stochastic simulation, para. 9;
e. either using an incorrect distribution for calculation of standard deviation, or not revealing what was in fact done to simulate variation, para. 10;
f. misusing the habitat capability index to conclude that patches less than one third the size of any observed to be used by a spotted owl pair will, in fact, support spotted owls, para. 11;
g. assuming, with no basis, that the pattern of patch size is a constant function of the fraction of the forest that is "suitable habitat" and that this pattern will continue to hold as the forest is logged, para. 12;
h. misinterpreting calculated probabilities of greater than 1 in the capability index as suggesting potential for supporting more than one pair when, in

fact, such impossible probabilities merely demonstrate that the calculations and sampling are incorrect, para. 14;

i. using the mathematical calculations of stochastic demography and inbreeding coefficients as "windowdressing" for justifying what turned out to be a subjective conclusion regarding viability "without a theoretical foundation," para. 17;

j. incorrectly asserting that there is no procedure for combining the factors that affect viability into one analysis, para. 19; and,

k. failing to come to grips with the uncertainty of the assessment by claiming ignorance as to how to account for it, para. 20.

Exhibit V at indicated paragraphs, attached hereto (submitted in support of plaintiffs' administrative appeal of the ROD).

34. In summary, Dr. Goodman concludes that the FSEIS viability analysis

> does not constitute a scientifically acceptable viability analysis. Quite the contrary, it is rife with elementary errors in statistics, mathematics and population dynamics. These errors are of sufficient magnitude to invalidate the conclusions of the entire process . . .

Id. at 3.

35. Mr. Daniel Doak finds major fault with the Forest Service's viability analysis. Mr. Doak points out that the FSEIS fails entirely to consider *the major threat* to the spotted owl's viability—the effect of habitat fragmentation from logging on the spotted owl population's ability to replenish itself over time. As a result, Mr. Doak concludes that the FSEIS "paints a considerably too rosy picture of the owl's viability." Exhibit P at 3.

36. Dr. Orians criticizes the FSEIS for not having "any scientific support for the agency's conclusion that the loss

of 4.5 percent of the remaining owl habitat will not contribute substantially to the long-term threat to the owl's viability." He adds two further criticisms:

a. there is no scientific support for the spacing criteria between spotted owl habitat areas, para. 15; and,

b. Alternative F's standards for amounts of suitable habitat in SOHAs do not appear to be based on existing scientific data regarding old-growth acreage required by spotted owl pairs, para. 16.

Exhibit S at indicated paragraphs.

37. In summary, the FSEIS viability analysis is seriously and fundamentally flawed in numerous respects. Neither it nor the ROD provides a rational basis to support the Chief's decision that further logging will not compromise the viability of the northern spotted owl or reduce its current population

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

VIOLATION OF THE NATIONAL FOREST MANAGEMENT ACT

1. The Chief's decision as set forth in the ROD does not assure that a viable population of northern spotted owls will be maintained in the Pacific Northwest, in violation of the National Forest Management Act, 16 U.S.C. § 1604(g)(3)(B) and its implementing regulations, 36 C.F.R. § 219.19. The Forest Service's violation of the NFMA is subject to judicial review under 5 U.S.C. §§ 702, 706(2)(A).

SECOND CLAIM FOR RELIEF

VIOLATION OF THE MIGRATORY BIRD TREATY ACT

2. Taking, killing or otherwise harming spotted owls and/or their habitat on Forest Service lands violates the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.* and its implementing regulations, 50 C.F.R. § 10 *et seq.* The Forest Service's violation of the MBTA is subject to judicial review under 5 U.S.C. §§ 702, 706(2)(A).

THIRD CLAIM FOR RELIEF

VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

3. The Forest Service's FSEIS violates the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and its implementing regulations, 40 C.F.R. § 1500 *et seq.*, because *inter alia*, the FSEIS:

a. failed to disclose all of the known and likely environmental consequences to the northern spotted owl of logging owl habitat for five years;

b. failed to acknowledge or assess the fundamental scientific uncertainty of its predicted environmental consequences on the spotted owl;

c. failed to acknowledge or respond to the overwhelming body of responsible scientific opinion that contradicts its conclusions.

4. The Forest Service's violations of NEPA in the FSEIS are subject to judicial review under 5 U.S.C. § 702, 706(2).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

A. Adjudge and declare that defendant's decision to select FSEIS Alternative F, as amended by the ROD, does

not assure the viability of the northern spotted owl and thus violates the NFMA and its implementing regulations.

B. Adjudge and declare that timber sales of suitable spotted owl habitat which result in the killing, taking or other harm to northern spotted owls and/or the owl's habitat violate the Migratory Bird Treaty Act and its implementing regulations.

C. Adjudge and declare that defendant's sales of suitable spotted owl habitat without an adequate environmental impact statement violate NEPA and its implementing regulations.

D. Adjudge and declare that defendants' actions as set forth above are arbitrary, capricious and not in accordance with law, contrary to 5 U.S.C. § 706(2)(A).

E. Adjudge and declare that defendants' actions as set forth above are not in compliance with procedures required by law, contrary to 5 U.S.C. § 706(2)(D).

F. Adjudge and declare that the defendants' ROD is null and void.

G. Order the Forest Service to comply with the requirements of NEPA, the NFMA and the MBTA, and until defendants do so, issue, as necessary, temporary restraining orders, preliminary and permanent injunctions restraining defendants from offering or awarding any contract for the sale and logging of timber from the Mount Baker-Snoqualmie, Olympic, Wenatchee, Gifford Pinchot, Okanogan, Mt. Hood, Siuslaw, Willamette, Umpqua, Siskiyou, Rogue River, Deschutes and Winema National Forests that will log more than forty (40) acres of suitable nesting or foraging habitat for northern spotted owls.

H. Award plaintiffs their reasonable fees, costs, expenses, and disbursements associated with this litigation.

I. Grant plaintiffs such additional and further relief as the Court may deem just and proper.

DATED: February 8th, 1989.

Respectfully submitted,

/s/ Victor M. Sher

VICTOR M. SHER
TODD D. TRUE
CORRIE J. YACKULIC
Sierra Club Legal Defense Fund
216 First Avenue South, Suite 330
Seattle, Washington 98104
(206) 343-7340
Attorneys for Plaintiffs

RECORD OF DECISION
USDA Forest Service

Amendment to the Pacific Northwest Regional Guide

Final Supplement to the
Final Environmental Impact Statement

* * * * *

SECTION 1: STANDARDS AND GUIDELINES

The *purpose* of Regional standards and guidelines for spotted owl habitat planning is to assure that individual Forest Land and Resource Management Plans meet the management requirement for insuring population viability (36 CFR 219.27(a)(6)). The standards and guidelines selected for Regional planning direction will be used by individual National Forests to assure that habitat is managed to maintain a viable population of spotted owls in the Region. These standards and guidelines provide planning direction to the National Forests. Management direction for specific locations within those forests will be determined in the Forest Plans.

The *expected result* of applying these standards and guidelines is to insure continued existence of a well-distributed population of spotted owls throughout the planning area. For purposes of spotted owl management, the planning area is composed of the 13 National Forests in the Pacific Northwest Region with spotted owl habitat (Figure 1). Specifically, standards and guidelines should ensure that:

1. appropriate kinds of forest stands are identified as suitable spotted owl habitat;
2. suitable habitat is provided in amounts and arrangements which meet annual or seasonal life needs of breeding pairs of spotted owls;

3. areas capable of supporting breeding pairs of spotted owls are distributed so that individuals can interact with others in the planning area, thus insuring a well-distributed population; and
4. the estimated number of reproductive individuals on each National Forest will contribute to a population throughout the Region that insures continued existence of the species.

Standard and Guideline 1. Amount of suitable habit in designated habitat areas.

The intent of this standard and guideline is to insure that breeding pairs in areas designated for spotted owls have sufficient habitat within their home ranges to meet overall life needs for survival and successful reproduction.

The amount of suitable spotted owl habitat at each designated habitat area will vary by physiographic province. The acreages should occur in at least one 300 acre stand of habitat that includes the nest site. Other habitats within 1.5 miles (Oregon) or 2.1 miles (Washington) of the nest site should be as contiguous as possible. The following amounts of suitable spotted owl habitat are to be designated per site:

Amount of Suitable Habitat to be Designated

Physiographic Province	National Forest	Amount of Habitat	Distance from Nest or Central Point
Olympic Peninsula	Olympic	3,000	2.1 mi.
Washington Cascades	Mt. Baker/Snoq.	2,200	2.1 mi.
	Okanogan	2,200	2.1 mi.
	Wenatchee	2,200	2.1 mi.
	Gifford Pinchot	2,200	2.1 mi.
Oregon Coast Range	Siuslaw	2,000	1.5 mi.

Amount of Suitable Habitat to be Designated—Cont'd

Physiographic Province	National Forest	Amount of Habitat	Distance from Nest or Central Point
Oregon Cascades	Mt. Hood	1,500	1.5 mi.
	Deschutes	1,500	1.5 mi.
	Willamette	1,500	1.5 mi.
	Umpqua	1,500	1.5 mi.
	Rogue River except Applegate District and west half of Ashland District	1,500	1.5 mi.
	Winema	1,500	1.5 mi.
Klamath	Siskiyou	1,000	1.5 mi.
	Rogue River Applegate District and west half of Ashland District		

Habitat areas may vary from the acreage objective if approved by the Regional Forester.

A habitat area may be larger than the acreage objective for suitable habitat if it meets at least one of the following two criteria:

1. The area contains more than one breeding pair of spotted owls, and it has been demonstrated that the reproductive rate, on average over time, has exceeded that necessary to replace the breeding adults.

2. The area is a key link in the network. A key link is defined as a spotted owl habitat area, which if not designated would result in a separation of the network contrary to spacing guidelines. Key links should be larger than the spotted owl habitat area acreage objective, especially where the local landscape contains little spotted owl habitat in lands unsuitable for

timber production or in reserved lands, and where the general forest landscape is heavily fragmented.

3. On the Olympic National Forest where the designated habitat areas shall average 3000 acres individual areas may be larger to compensate for those where less than the prescribed acreage is available.

Designated spotted owl habitat areas may contain less than the acreage objective for habitat where:

1. Breeding success within the previous two years has been documented and the amount and quality of spotted owl habitat has not declined significantly within the pair's home range during the previous two years.

2. The habitat area is necessary to meet spacing requirements and less than the suitable habitat acreage objective exists.

3. In addition, if acreage of suitable habitat is less than 1000 acres and meets one of the above criteria, potential habitat that will bring the total existing and potential habitat to 1000 acres shall be added.

Standard and Guideline 2. Spacing of designated habitat areas.

The intent of this standard and guideline is to insure that reproductive individuals are well distributed so they can interact with others in the planning area (the regional population). The ability to interact provides for recolonization of unoccupied habitats, interchange of genetic resources, and resilience of populations to normal fluctuations in births and deaths.

Distances between habitat areas within clusters of three or more spotted owl habitat areas shall be not more than 1.5 miles measured edge to edge.

Distances between clusters of three or more spotted owl habitat areas or between habitats in land unsuitable for

timber production that can support at least three pairs, shall be not more than 12 miles measured edge to edge except on the Olympic National Forest where they shall be not more than 8 miles.

Distances between all other habitat areas (cluster, single, or habitat area within land unsuitable for timber that could support at least one pair) shall be not more than six miles measured edge to edge except on the Olympic National Forest where they shall be not more than 2 miles.

Distances between spotted owl habitat areas may be extended 20 percent (that is, up to 7.2 miles for singles and 14.4 miles for clusters, or 2.4 miles and 9.6 miles respectively on the Olympic National Forest). This variation applies only where needed to locate a habitat area at a site with higher level of spotted owl occupancy (i.e., contains pair, rather than single bird) than would be otherwise available.

Each designated habitat area should link to at least three other areas within the spacing standards. These three other areas can be other designated spotted owl habitat areas, or suitable spotted owl habitat in lands unsuitable for timber production. A cluster is not considered to be three distinct areas for the purpose of this positioning.

Spacing standards apply across boundaries of adjacent National Forests. National Forests adjacent to other ownerships having suitable spotted owl habitat that will be maintained over time should provide habitats to help ensure distribution across ownership boundaries, and, as far as practicable, coordinate their efforts to identify and designate habitat areas. In this regard, other ownerships include, but are not restricted to, USDI Bureau of Land Management and USDI National Park Service.

Standard and Guideline 3. Threatened and Endangered Species.

No spotted owl habitat management activity shall adversely affect Federally listed threatened or endangered species or their habitats.

Standard and Guideline 4. Identification of suitable habitat.

The intent of this standard and guideline is to provide consistency and accuracy in identifying forest stand conditions that constitute suitable habitat for spotted owls. Its principal application will be in inventory, mapping, and monitoring to assure that the right kinds of habitat are being designated or counted as appropriate.

Vegetation types. Vegetation types in which spotted owl habitat occurs are:

Spruce/Cedar/Hemlock Forest
Cedar/Hemlock/Douglas-fir Forest
Mixed Conifer Forest
California Mixed Evergreen Forest
Silver fir/Douglas-fir Forest
Red fir Forest
Ponderosa Shrub Forest with White fir/Grand fir
Fir/Hemlock Forest
Grand fir/Douglas-fir Forest
Douglas-fir Forest

Stand structure. The following structural characteristics identify forest stands suitable for spotted owls. These conditions occur at different ages for each vegetation type and location, but in general they occur in stands considered to be mature and old growth.

a. Relatively large diameter of dominant trees in the stand.

b. Multi-layered canopy of trees with a moderate to high canopy closure in overstory, midstory, and understory layers.
c. Large, tall trees with cavities, broken tops, mistletoe, or platforms of branches capable of holding accumulated organic matter suitable for nesting.
d. Dead standing trees and fallen decayed trees to support abundant populations of prey species, especially northern flying squirrel and woodrat.
e. Stands with the above conditions and larger than 60 acres in area.

National Forests will specify the inventory and mapping criteria used to identify suitable spotted owl habitat in Forest planning, subject to approval by the Regional Forester.

Suitable habitat (vegetation types and structural or developmental stages) shall be identified in Forest Plans for inventory, mapping, and monitoring purposes in accordance with the general description above.

Standard and Guideline 5. Options for managing designated spotted owl habitat areas.

The intent of this standard and guideline is to provide consistency and efficiency in planning the management of forest stands within designated spotted owl habitat areas.

Spotted owl habitat can be provided by even-aged or unevenaged silviculture, or no scheduled harvest. Determination of the prescriptions selected will occur in the Forest Plans. Each National Forest will determine how spotted owl habitat is maintained through time.

Standard and Guideline 6. Criteria for locating designated habitat areas.

The intent of this standard and guideline is to designate spotted owl habitat areas without unnecessary restrictions

of other uses of the forest, to the extent possible while meeting the management requirement for spotted owl population viability. This standard and guideline shall be used on all spotted owl Forests in the Pacific Northwest Region.

1. Map spotted owl habitat in the following land use designations in each National Forest's Land and Resource Management Plan: lands withdrawn by Chief's authority or higher, other lands unsuitable for timber production, lands suitable for timber production with reduced yields and lands suitable for timber production with full yields.
2. Map the known locations of spotted owls on each Forest, and show locations of breeding pairs, pairs with verified non-breeding status or breeding status unknown, and other spotted owl sightings.
3. Identify areas in land unsuitable for timber production that have at least the specified acres of habitat within 1.5 miles from a central point in Oregon, and 2.1 miles from a central point in Washington.
4. Assess the distribution of habitat relative to spacing standards to determine if additional spotted owl habitat areas need to be designated. If designation is necessary, use mapped owl locations at the priorities for selecting spotted owl habitat areas in lands suitable for timber production.
5. Designate spotted owl habitat areas on lands suitable for timber production if needed to meet the spacing standard.
    a. If a verified breeding pair is located closer than six miles from the edge of lands unsuitable for timber production, or closer than two miles on the Olympic National Forest, then that area can

be designated if there are no verified breeding pairs within the adjacent lands unsuitable for timber production.

b. The preference is to provide spotted owl habitat areas in a cluster arrangement.

c. Use reduced yield lands before full yield lands where compatible with other criteria.

d. Use the following priorities in designating spotted owl habitat areas on lands suitable for timber production (listed in decreasing order of priority):

   1. Verified occupancy by breeding pairs within the last 5 years. If verification is not based on data from the current year, the site should meet or approximately meet Regional standards for habitat amounts and characteristics, or the habitat amounts and characteristics must have remained stable since the year of verification.
   2. Verified occupancy by breeding pairs more than 5 years ago. If verification is not based on data from the current year, the site should meet Regional standards for habitat amounts and characteristics, or the habitat amounts and characteristics must have remained stable since the year of verification.
   3. Verified occupancy by pairs; verified non-breeding, or breeding status or success unknown. If verification is not based on data from the current year, the site should meet or approximately meet Regional standards for habitat amounts and characteristics, or the habitat amounts and characteristics must have remained stable since the year of verification.

4. Presence of spotted owls; pair status unknown.
5. Areas with an appropriate amount of suitable owl habitat, within the radius prescribed, where the presence or absence of owls is unknown. An appropriate amount of habitat is that specified in Standard and Guideline 1. Amount of suitable habitat in designated areas.

Implementation of these standards and guidelines shall be achieved in a cost effective manner. Their application will result in designation of spotted owl habitat capable of supporting pairs of spotted owls through time. Table 1 displays the capability to support pairs of spotted owls which each National Forest with spotted owl habitat is to maintain for 15 years from the present. The Regional Forester will approve National Forest spotted owl habitat networks which result from the application of these standards and guidelines.

Supreme Court of the United States

No. 90-1596

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, ET AL., PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 28, 1991.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

June 28, 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/47001

Supreme Court, U.S.
FILED
AUG 27 1991
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No. 90-1596

In the Supreme Court of the United States

OCTOBER TERM, 1991

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CLIFFORD M. SLOAN
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MARTIN W. MATZEN
ANNE S. ALMY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether Section 318(b)(6)(A) of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 100-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747 (1989), which provides interim statutory standards not subject to judicial review for management of government forest timber sales that had been challenged in pending federal court actions, violates the constitutional principle of separation of powers.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Pilchuck Audubon Society, Washington Environmental Council, Washington Native Plants Society, Oregon Natural Resources Defense Council, Inc., Portland Audubon Society, Lane County Audubon Society, and Siuslaw Task Force were plaintiffs in the district court (W.D. Wash.) and appellants in the court of appeals. Washington Contractor Loggers Association and William Pickell were also plaintiffs in the district court and appellees in the court of appeals.

Portland Audubon Society, Headwaters, Lane County Audubon Society, Oregon Natural Resources Council, Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council were plaintiffs in the district court (D. Or.) and appellants in the court of appeals. Northwest Forest Resource Council, Huffman & Wright Logging Co., Freres Lumber Co., Inc., Lone Rock Timber Co., Inc., Scott Timber Co., Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Inc., Douglas County Forest Products Company, Medford Corporation, Rogge Forest Products, Inc., Association of O & C Counties, and Benton County were defendants/intervenors in the district court and appellees in the court of appeals.

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§ 318(a)(1), 103 Stat. 745 ..... 10, 21, 32
§ 318(a)(2), 103 Stat. 745 ..... 10, 21, 32
§ 318(b), 103 Stat. 745-747 ..... 10, 11, 16, 21
§ 318(b)(1), 103 Stat. 745-746 ..... 10, 21, 31
§ 318(b)(2), 103 Stat. 746 ..... 10, 21, 32
§ 318(b)(3), 103 Stat. 746 ..... *passim*
§ 318(b)(3)(F), 103 Stat. 746 10
§ 318(b)(4), 103 Stat. 746 ..... 3, 10, 21, 31
§ 318(b)(5), 103 Stat. 746-747 ..... *passim*
§ 318(b)(6)(A), 103 Stat. 747 ..... *passim*
§ 318(b)(6)(B), 103 Stat. 747 30
§ 318(c), 103 Stat. 747-748 ..... 11, 21, 31
§ 318(c)(2), 103 Stat. 748 30

Statutes and regulations—Continued: Page

§ 318(c)-(k), 103 Stat. 747-750 16
§ 318(d), 103 Stat. 748 ..... 11, 21, 32
§ 318(e), 103 Stat. 748 11
§ 318(f), 103 Stat. 748-749 ..... 11, 31
§ 318(f)(1), 103 Stat. 748-749 ..... 12, 30
§ 318(f)(2), 103 Stat. 749 12
§ 318(f)(3, 103 Stat. 749 11
§ 318(g), 103 Stat. 749-750 ..... 11, 21, 24, 32
§ 318(g)(1), 103 Stat. 749-750 ..... 11, 15
§ 318(h), 103 Stat. 750 ..... 11, 30
§ 318(i), 103 Stat. 750 11
§ 318(j), 103 Stat. 750 11
§ 318(k), 103 Stat. 750 ..... 11, 15
Endangered Species Act, 16 U.S.C. 1531 *et seq.* 3
Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.* 5, 6
Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.* 6
National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* 6
National Forest Management Act, 16 U.S.C. 1601 *et seq.* 8
Oregon and California Lands Act, 43 U.S.C. 1181a 5, 6
Pub. L. No. 89-554, § 1, 80 Stat. 425 (1966) 26
Pub. L. No. 92-318, § 506(m), 86 Stat. 352 (1972) 26
Pub. L. No. 96-487, § 708(b)(2), 94 Stat. 2421 (1980) 27
Pub. L. No. 96-560, § 107(b)(2), 94 Stat. 3270-3271 (1980) 27
Pub. L. No. 97-384, § 4(b)(2), 96 Stat. 1942-1943 (1983) 27
Pub. L. No. 97-407, § 5(b)(2), 96 Stat. 2034 (1983) 27
Pub. L. No. 97-466, § 5(b)(2), 96 Stat. 2541 (1983) 27
Pub. L. No. 98-140, § 3(a)(2), 97 Stat. 902 (1983) 27
Pub. L. No. 98-321, § 5(b), 98 Stat. 251 (1984) 27
Pub. L. No. 98-322, § 105(b)(2), 98 Stat. 255 (1984) 27
Pub. L. No. 98-323, § 104(b), 98 Stat. 260 (1984) 27

Statutes and regulations—Continued: Page

Pub. L. No. 98-324, § 5(b), 98 Stat. 265 (1984) 27
Pub. L. No. 98-328, § 5(b), 98 Stat. 278 (1984) 27
Pub. L. No. 98-339, § 5(b)(2), 98 Stat. 303 (1984) 27
Pub. L. No. 98-406, § 103(b)(2), 98 Stat. 1490 (1984) 27
Pub. L. No. 98-425, § 111(b), 98 Stat. 1628 (1984) 27
Pub. L. No. 98-428, § 201(b), 98 Stat. 1659-1660 (1984) 27
Pub. L. No. 98-430, § 6(b)(2), 98 Stat. 1667-1668 (1984) 27
Pub. L. No. 98-473, 98 Stat. 1954 (1984) 26
Pub. L. No. 98-508, § 4(b), 98 Stat. 2351 (1984) 27
Pub. L. No. 98-514, § 5(b)(2), 98 Stat. 2417 (1984) 27
Pub. L. No. 98-515, § (5)(b)(2), 98 Stat. 2421 (1984) 27
Pub. L. No. 98-550, § 401(b)(2), 98 Stat. 2811 (1984) 27
Pub. L. No. 98-578, § 5(b)(2), 98 Stat. 3089 (1984) 27
Pub. L. No. 98-586, § 5(b)(2), 98 Stat. 3107 (1984) 27
Pub. L. No. 99-490, § 5(b)(2), 100 Stat. 1236 (1986) 27
Pub. L. No. 99-504, § 104(b), 100 Stat. 1803 (1986) 27
Pub. L. No. 99-662, § 204, 100 Stat. 4099 (1986) 26
Pub. L. No. 100-184, § 6(b)(2), 101 Stat. 1276 (1987) 27
Pub. L. No. 100-440, § 631, 102 Stat. 1759 (1988) 26
Pub. L. No. 100-499, § 6(b)(2), 102 Stat. 2493 (1988) 27
Pub. L. No. 100-547, § 202, 102 Stat. 2738 (1988) 26
Pub. L. No. 101-195, § 5(b)(2), 103 Stat. 1786 (1989) 26
Pub. L. No. 101-401, § 5(b)(2), 104 Stat. 864 (1989) 26

Statutes and regulations—Continued: Page

Pub. L. No. 101-624, § 1736, 104 Stat. 3793 (1990) 26
28 U.S.C. 1292(b) 13
Proclamation No. 11, 13 Stat. 737 (1863) 40
36 C.F.R. 219.8(a) 8

Miscellaneous:

P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* (3d ed. 1988) 43, 44
Cong. Globe, 41st Cong., 2d Sess. 3814-3825 (1870) 42
135 Cong. Rec. (1989):
Daily ed. Oct. 3:
p. H6506 32
p. H6507 32
p. H6509 32
Daily ed. Oct. 7:
p. S12,961 32
p. S12,964 32
Eisenberg, *Congressional Authority To Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498 (1974) 43
C. Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-68* (1971) 42
55 Fed. Reg. (1990):
p. 26,114 3
pp. 26,114-26,115 3
p. 26,175 3
p. 26,189 4-5
H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. (1989) 4, 9, 29
Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States *v.* Klein *Revisited*, 1981 Wis. L. Rev. 1189 ..... 40-41, 42

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1596

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-17a) is reported at 914 F.2d 1311. The opinion and order of the district court in *Seattle Audubon Society* v. *Robertson*, No. 89-160WD (W.D. Wash) (Pet. App. 20a-28a, 29a-34a) are unreported. The opinion of the district court in *Portland Audubon Society* v. *Lujan*, No. 87-1160-FR (D. Or.) (Pet. App. 35a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1990. Petitions for rehearing were denied on January 16, 1991. Pet. App. 18a-19a. The petition for a writ of certiorari was filed on April 12, 1991, and was granted on June 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 318(b)(6)(A) of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 747 (1989), provides:

> Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 745-750 (1989), is reproduced in its entirety at App., *infra*, 1a-13a.[1]

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[1] Section 318 is also reprinted at Pet. App. 43a-55a. The petition appendix, however, contains two printing errors: one line was inadvertently omitted after the first line in Section (b)(3), on Pet.

STATEMENT

This case involves "the ongoing controversy over logging in old growth forests in Oregon and Washington and the impact of that logging on the northern spotted owl." Pet. App. 5a. Old-growth forests are favored natural habitat for the northern spotted owl, *Strix occidentalis caurina*. The bird's current range extends from northern California, through the coastal and cascade regions of Oregon and Washington, and into southern British Columbia. Because of logging and land conversion activities, approximately 90% of suitable habitat for northern spotted owls now occurs on government land.[2] The Forest Service manages 79% of the habitat on federal land, and the Bureau of Land Management manages 14% of it; the remaining 7% is on National Park Service land. Sixty percent of northern spotted owl habitat on federal land is in areas classified as "timber production land." 55 Fed. Reg. 26,114-26,115, 26,175 (1990).

In the late 1980's, respondents—the Seattle Audubon Society, the Portland Audubon Society, and other environmental groups—filed actions in the Western District of Washington and the District of Oregon challenging the federal government's efforts to continue logging old-growth timber in government-owned forests located in the Pacific Northwest. During the pendency of those federal court proceedings, Congress enacted Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. 101-121, Tit. III, 103 Stat. 745-750 (1989), also known as the Northwest Timber Compromise. Section 318 "sets terms and conditions applica-

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App. 45a, and one line was inadvertently omitted after the eleventh line of Section (b)(4), on Pet. App. 46a.

[2] In June 1990, during the pendency of respondents' lawsuits, the United States Fish and Wildlife Service listed the northern spotted owl as a threatened species under the Endangered Species Act, 16 U.S.C. 1531 *et seq.* See 55 Fed. Reg. 26,114 (1990).

ble only for fiscal year 1990 for making timber sales on Federal lands in Oregon and Washington, for managing habitat for northern spotted owls, and for minimizing fragmentation of significant old growth forest stands." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 87 (1989). Its purpose was to "balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted owl and significant old growth forest stands." *Ibid.*

The district courts in Oregon and Washington concluded that Section 318 operated as a "temporary modification of the environmental laws" invoked by respondents in their lawsuits. Pet. App. 25a; see also *id.* at 37a-38a. Accordingly, the district courts determined that the statute by its terms precluded respondents' claims for relief.

The Ninth Circuit reversed, holding that one part of Section 318—the first sentence in Section 318(b)(6)(A)—violates the constitutional principle of separation of powers set forth in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). The court of appeals determined that Section 318(b)(6)(A) "does not establish new law, but directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court." Pet. App. 14a. In the court's view, "[t]his is what *Klein* and subsequent cases agree is constitutionally proscribed." *Ibid.* The court of appeals thus remanded the cases to the district courts for consideration of the merits of respondents' challenges.

A. Initial Proceedings In The District Courts and Court of Appeals

1. *Portland Audubon Society* v. *Lujan*

The Bureau of Land Management (BLM), an agency of the Department of the Interior, manages approximately 2.4 million acres of forested land in Oregon. 55

Fed. Reg. 26,189 (1990). Most of these lands are revested Oregon and California Railroad (O & C) grant lands that are administered pursuant to the Oregon and California Lands Act (OCLA), 43 U.S.C. 1181a.[3] The remainder is interspersed, never-patented public domain lands administered pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*

Between 1979 and 1983, the BLM completed seven separate timber management plans and environmental impact statements to govern timber harvesting on BLM lands, for the next decade, in seven specified areas of western Oregon.[4] Under these documents, habitat for a total of 66 to 85 pairs of the northern spotted owl was to be protected. GXs 122-128. By agreements between the Oregon Department of Fish and Wildlife and the BLM, the number of protected pairs was raised to 90 in 1983, and to 110 in 1987. GXs 129, 138.

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[3] The saga of the O & C lands is told in *Oregon & Cal. R.R.* v. *United States*, 238 U.S. 393 (1915). See also *Oregon & Cal. R.R.* v. *United States*, 243 U.S. 549 (1917). Briefly, between 1866 and 1870, Congress made a series of grants of alternate sections of land along the right of way of a railroad to be built between Portland and the California border. A proviso to the land grants required that the lands be sold to actual settlers in amounts not to exceed 160 acres at a price not to exceed $2.50 an acre. After 1894, however, the railroad disposed of some of the land in violation of the proviso; the United States sued to enforce the proviso or forfeit the lands. Ultimately, Congress enacted the Chamberlain-Ferris Revestment Act of June 9, 1916, ch. 137, 39 Stat. 218, which revested unsold lands in the United States, and provided compensation to the railroad.

The term "O & C lands" also encompasses Coos Bay Wagon Road lands reconveyed by the Southern Oregon Company to the United States pursuant to the Act of Feb. 26, 1919, ch. 47, 40 Stat. 1179. See *Southern Oregon Co.* v. *United States*, 249 U.S. 589 (1919).

[4] The BLM lands in western Oregon are divided into five administrative districts. Seven timber management plans and EIS's were prepared because two districts are subdivided into two subareas.

In 1986, BLM commenced preparing replacement plans, called Resource Management Plans, which were then scheduled for completion in 1990. GX 114.[5] In 1987, the Oregon State office of the BLM—an administrative unit within the BLM—prepared an environmental assessment to determine whether significant new information concerning the northern spotted owl had developed since the preparation of the seven timber management plans. GX 125. On April 10, 1987, that office issued a notice stating that BLM would not supplement the prior environmental impact statements; the agency concluded that new information was not significant, and that options for the protection of the northern spotted owl would be available at the time of the expected completion of the new plans. GX 136.

In October 1987, Portland Audubon Society and other environmental groups (hereafter the Portland Audubon respondents) filed a complaint for declaratory and permanent injunctive relief challenging BLM's decision not to prepare a supplement to the environmental impact statements for the timber management plans adopted in the period 1979-1983. J.A. 42-56. The complaint alleged violations of four federal statutes: (1) the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*; (2) the Oregon and California Lands Act (OCLA), 43 U.S.C. 1181a; (3) the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*; and (4) the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 *et seq.* On each of these four counts, the Portland Audubon respondents alleged that their cause of action rested upon the provisions of the Administrative Procedure Act (APA) for judicial review of agency action, 5 U.S.C. 702, 706(2)(A). J.A. 53-54.

In April 1988, the district court dismissed the action, holding that Section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1988,

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[5] These plans are still in preparation.

Pub. L. No. 100-202, Tit. III, 101 Stat. 1329-254 (1987), precluded judicial review of Portland Audubon's claims.[6] In January 1989, however, after granting injunctions pending appeal, the court of appeals reversed and remanded for further proceedings. *Portland Audubon Society* v. *Hodel*, 866 F.2d 302 (9th Cir.), cert. denied, 492 U.S. 911 (1989).[7]

On remand, in May 1989, the district court again dismissed the Portland Audubon respondents' action on the basis of the statutory bar in Section 314. *Portland Audubon Society* v. *Lujan*, 712 F. Supp. 1456 (D. Or. 1989). The court of appeals again enjoined BLM timber sales pending appeal. In September 1989, the appellate court affirmed the district court's dismissal of respondents' NEPA claim, but reversed and remanded the dismissal of respondents' claims under the OCLA, FLPMA and MBTA. *Portland Audubon Society* v. *Lujan*, 884 F.2d 1233 (9th Cir. 1989), cert. denied, 494 U.S. 1026 (1990).[8]

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[6] In pertinent part, Section 314 provided that

> there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further*, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

101 Stat. 1329-254.

Congress later reenacted that express provision. See Department of the Interior and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-446, Tit. III, § 314, 102 Stat. 1825-1826 (1988); Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, § 312, 103 Stat. 743 (1989). The validity and effect of that provision are not at issue here, but are at issue in a pending Ninth Circuit appeal. *Portland Audubon Society* v. *Lujan*, No. 91-35802.

[7] The court of appeals also vacated the previously entered stay "without prejudice to any appropriate renewed efforts by [respondents] to obtain such temporary remedies, if any, as the district court may deem necessary and proper." 866 F.2d at 309-310.

[8] Upon issuance of its final decision, the court vacated the stay that it had granted pending appeal. 884 F.2d at 1234, 1242.

2. *Seattle Audubon Society* v. *Robertson*

Region 6 of the United States Forest Service, Department of Agriculture, covers the States of Oregon and Washington. It contains 19 national forests, 13 of which are known to contain the northern spotted owl.

In 1976, Congress enacted the National Forest Management Act (NFMA), 16 U.S.C. 1601 *et seq.* That Act sets forth procedures, criteria, and guidelines for the development of land management plans for National Forest System units. In implementing NFMA, the Forest Service promulgated regulations calling for the development of regional guides. 36 C.F.R. 219.8(a). Regional guides "provide standards and guidelines for addressing major issues and management concerns which need to be considered at the regional level to facilitate forest planning." *Ibid.*

In 1984, Region 6 completed its regional guide which, *inter alia*, addressed habitat requirements for the northern spotted owl. J.A. 65. In 1985, on administrative appeal, the Department of Agriculture remanded the northern spotted owl portion of the regional guide to the Forest Service for reconsideration. J.A. 65. The Forest Service prepared a supplemental environmental impact statement and, in December 1988, issued a Record of Decision adopting an amendment to the regional guide. J.A. 67. That amendment called for the creation of Spotted Owl Habitat Areas (SOHAs) around northern spotted owl pairs or individuals and in empty spotted owl habitat. The SOHAs were to range in size from 1000 acres in the more southerly Klamath Mountain Province (Siskiyou National Forest) to 3000 acres in the northwestern Olympic Peninsula Province (Olympic National Forest). J.A. 79-80. Other standards and guidelines prescribed criteria for SOHA selection and spacing of the SOHAs. J.A. 81-87.

In February 1989, Seattle Audubon Society and other environmental groups (hereafter the Seattle Audubon respondents) filed suit against the Chief of the Forest

Service in the United States District Court for the Western District of Washington. The Seattle Audubon respondents claimed that the Forest Service's plan for managing the northern spotted owl habitat in Region 6 national forests violated NEPA, the MBTA, and the NFMA. J.A. 74-75.[9] They sought declaratory and injunctive relief, barring the Forest Service from implementing its plans. Pet. App. 6a, 30a-32a. In a series of rulings issued in the spring of 1989, the district court preliminarily enjoined 163 timber sales in Washington and Oregon. Those sales each involved areas of 40 acres or more of suitable spotted owl habitat. *Id.* at 6a, 30a-33a.

B. Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990

In the midst of the disruption caused by the injunctions issued in the course of respondents' lawsuits, Congress enacted Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 100-121, Tit. III, 103 Stat. 745-750 (1989), in order to "balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted owl and significant old growth forest stands." H.R. Conf. Rep. No. 264, *supra*, at 87. Consequently, as effective October 23, 1989, Section 318 "sets terms and conditions applicable only for fiscal year 1990 for making timber sales on Federal lands in Oregon and Washington, and for minimizing fragmentation of significant old growth forest stands." *Ibid.*

1. Section 318(a) sets the amount of timber sales. It provides that the Forest Service shall offer "an aggregate timber sale level of seven billion seven hundred million board feet" of "net merchantable timber" from the

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[9] The Washington Contract Loggers Association filed a similarly based action against the Forest Service, "challenging the [Service's] guidelines as overly restricting timber harvesting." Pet. App. 6a. The district court consolidated that action with the Seattle Audubon respondents' lawsuit. *Id.* at 31a.

national forests of Oregon and Washington for fiscal years 1989 and 1990. § 318(a)(1). Of that total, "an aggregate timber sale level for fiscal years 1989 and 1990 of five billion eight hundred million board feet" must come from "the thirteen national forests in Oregon and Washington known to contain northern spotted owls." *Ibid.* The legislation further provides that BLM shall offer "an aggregate timber sale level of one billion nine hundred million board feet for fiscal years 1989 and 1990 from its administrative districts in western Oregon." § 318(a)(2).

2. Section 318(b) then prescribes standards for the timber sales. Sections 318(b)(1), 318(b)(2), and 318(b)(4) require the Forest Service to minimize fragmentation of ecologically significant old-growth forest stands in planning timber sales. Section 318(b)(3) forbids Forest Service timber sales within Spotted Owl Habitat Areas (SOHAs) pursuant to the regional guide, and expands the areas of SOHAs in each geographic province.[10] Aside from these modifications, "[a]ll other standards and guidelines contained in the [Forest Service] Chief's Record of Decision are adopted." § 318(b)(3)(F). With regard to the BLM, Section 318(b)(5) forbids timber sales in the 110 areas designated for northern spotted owl protection in the December 1987 agreement between the BLM and the Oregon Department of Fish and Wildlife. Section 318(b)(5) also directs the BLM to identify, through consultation with state and federal agencies, 12 additional spotted owl habitat areas, and forbids timber sales in those additional areas.

Section 318(b)(6)(A), in turn, addresses the applicability of certain statutes. The Section begins by stating that Congress is not "passing on the legal and factual adequacy of" the Forest Service's Environmental Impact

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[10] For example, the SOHA size for the Klamath Mountain Province was expanded from 1000 acres to 1250 acres; the size for the Olympic Peninsula Province from 3000 acres to 3200 acres. See § 318(b)(3); J.A. 79, 80.

Statement and Record of Decision and BLM's agreement with the Oregon Department of Fish and Wildlife. It then relates that "the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for" the *Portland Audubon* and *Seattle Audubon* cases. The subsection then adds that "[t]he guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." App., *infra*, 5a-6a.

3. In order to protect the 1990 timber sale programs from litigation disruptions, Section 318(g) provides streamlined judicial review procedures. The provision provides for expedited judicial review of individual timber sale decisions by suits filed within fifteen days of the initial advertisement of the sale. It prohibits federal courts from issuing a "restraining order or preliminary injunction * * * with respect to any decision * * * [regarding] timber sales in fiscal year 1990 from the thirteen national forests in Oregon and Washington and [BLM] lands in western Oregon known to contain northern spotted owls." § 318(g)(1). It nevertheless specifically authorizes courts "to enjoin permanently * * * an individual sale" after a determination on the merits that the sale decision was "arbitrary, capricious or otherwise not in accordance with law." *Ibid.*[11]

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[11] In addition to Sections 318(a), (b), and (g), Section 318 contains eight other provisions. Sections 318(c), (d), (e), and (h) further elaborate on the required procedures, and Sections 318 (i), (j), and (k) clarify the effect of various parts of the legislation. Section 318(f) specifically addresses the Seattle Audubon litigation. It orders that timber sales aggregating 1.1 billion board feet from the sales subject to the injunction in the *Seattle Audubon* case be offered notwithstanding the provisions of law that formed the basis for the preliminary injunction entered in the case. § 318(f)(3). It

C. District Court Proceedings In Light of Section 318

1. *Seattle Audubon Society* v. *Robertson*

As a result of the express provisions of Section 318, the government in October 1989 asked the district court to vacate the preliminary injunction it had previously entered barring the 163 planned timber sales in Washington and Oregon. The Seattle Audubon respondents countered that Section 318(b)(6)(A) was unconstitutional, contending that Congress impermissibly directed the result in pending actions and otherwise unlawfully barred judicial review of the one-year guidelines established by the statute. Pet. App. 23a.

In November 1989, the district court granted the government's motion, rejected the Seattle Audubon respondents' constitutional challenge, and vacated the preliminary injunction. Pet. App. 20a-28a, 29a-34a. The court concluded that Section 318(b)(6)(A) "does not require a particular decision on the issues of this case." Pet. App. 24a. On the contrary, the court determined, "Congress has adopted the Forest Service's proposed guidelines, challenged by [respondents], as statutory law for a period of one year." *Ibid.* Congress has "the power to do this," the court recognized, since "[j]ust as Congress may create a geographic exception to the environmental laws, it may also create a temporal exception." *Ibid.* The court also rejected the Seattle Audubon respondents' contention that the statute's bar to judicial review was unconstitutional, noting that Congress may restrict federal court jurisdiction, and that Section 318(b)(6)(A) "means only that, as new statutory law, the guidelines [mandated in subsections (b)(3) and (b)(5)] cannot be tested in court for compliance with the National Forest Management

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also specifies a procedure in which the Seattle Audubon respondents would be permitted to participate in selecting, from a list submitted by the Forest Service, certain sales and prohibiting other sales; such sales would not be subject to judicial review. § 318(f)(1) and (2).

Act, the National Environmental Policy Act, or other general environmental statutes." Pet. App. 25a-26a.[12]

2. *Portland Audubon Society* v. *Lujan*

In the district court, the government similarly sought to dismiss the Portland Audubon respondents' pending claims in view of newly enacted Section 318. Respondents contended that Section 318(b)(6)(A), which in their view prescribed a rule of decision in the pending action, violated the constitutional principle of separation of powers. Pet. App. 37a.

In December 1989, the district court granted the government's motion and dismissed respondents' statutory claims as moot, without prejudice to refiling after the end of fiscal year 1990. Pet. App. 35a-42a. The court rejected respondents' constitutional challenge, adopting the "reasoning and result" of the district court in the *Seattle Audubon Society* case. *Id.* at 37a.[13]

D. The Court of Appeals Decision

In September 1990, the court of appeals reversed, holding that Section 318(b)(6)(A) violates the constitutional principle of separation of powers. Pet. App. 1a-17a. Relying principally on *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), and *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980), the court stated that the

> critical distinction, for purposes of deciding the limits to Congress' authority to affect pending litigation through statute, is between the repeal or amendment of the law underlying the litigation,

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[12] In January 1990, the district court certified respondents' constitutional challenge to Section 318(b)(6)(A) for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 8a; J.A. 19.

[13] The Portland Audubon respondents noted an appeal from the district court's final judgment dismissing their action. The court of appeals later consolidated the *Seattle Audubon* and *Portland Audubon* appeals. Pet. App. 5a, 8a.

> which is permissible, and the direction of a particular decision in a case, without repealing or amending the law underlying the litigation, which is not permissible.

Pet. App. 11a-12a.

Turning to Section 318(b)(6)(A), the court determined that the statute "does not, by its plain language, repeal or amend the environmental laws underlying this litigation." Pet. App. 13a. Instead, the court stated, "[t]he clear effect of subsection (b)(6)(A) is to direct [the court] that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5), then the government will have done what is required under the environmental statutes involved in these cases." *Ibid.*

Having construed the statute in this manner, the court concluded that "[i]n this way Congress, through section 318, seeks to perform functions reserved to the courts by Article III of the Constitution." Pet. App. 14a. In other words, Section 318(b)(6)(A) "does not establish new law, but directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in the federal court." *Ibid.* In the court's view, "[t]his is what *Klein* and subsequent cases agree is constitutionally proscribed." *Ibid.*[14]

Finally, the court of appeals noted that "even if [it] could interpret section 318 as a temporary repeal of the environmental laws at issue in the underlying litigation, then section 318 would amount to an implied partial repeal of the environmental statutes." Pet. App. 16a. Relying on *TVA* v. *Hill*, 437 U.S. 153 (1978), and circuit precedent, the court stated that Congress could not partially repeal substantive law in an "appropriations measure." Pet. App. 16a.

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[14] Before denying petitions for rehearing in January 1991, Pet. App. 18a-19a, the panel issued an order amending its opinion in several respects, *id.* at 3a-4a. The opinion reprinted in the petition appendix (*id.* at 4a-17a) incorporates these amendments.

E. District Court Proceedings On Remand From Court of Appeals' Invalidation of Section 318(b)(6)(A)

1. *Seattle Audubon Society* v. *Robertson*

Subsequent to the court of appeals' decision, the Seattle Audubon respondents renewed their objections to 12 Forest Service timber sales. In December 1990, the district court set aside and enjoined those sales for violations of NEPA, NFMA, and the MBTA, *Seattle Audubon Society* v. *Robertson*, No. 89-160WD (W.D. Wash. Dec. 18, 1990), *reprinted at* Br. in Opp. App. 126a-143a, appeal pending, No. 91-35378 (9th Cir).

Respondents also sought to challenge an additional six Forest Service 1990 timber sales. The district court dismissed those challenges as untimely under the fifteen-day limitations period of Section 318(g)(1), 103 Stat. 749. The court of appeals reversed, ruling that the fifteen-day period had been equitably tolled during the period that respondents were challenging the constitutionality of Section 318(b)(6)(A). *Seattle Audubon Society* v. *Robertson*, 931 F.2d 590 (9th Cir. 1991), *reprinted at* Br. in Opp. App. 66a-84a. On remand, the district court enjoined four of the challenged sales; the remaining two sales had been substantially harvested. *Seattle Audubon Society* v. *Evans*, No. 89-160WD (W.D. Wash. May 24, 1991), *reprinted at* Br. in Opp. App. 85a-88a, appeal pending, No. 91-35564 (9th Cir.).[15]

2. *Portland Audubon Society* v. *Lujan*

On remand from the court of appeals, the district court granted partial summary judgment to the government. It found that Portland Audubon's NEPA claim had been

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[15] In their brief in opposition to certiorari, respondents stated that they are not pursuing their challenge to any 1990 Forest Service sales besides the 16 that have been enjoined. See Br. in Opp. 11 n.7. Because Section 318(k) provides that fiscal 1990 sales will be governed by the 1990 Appropriations Act even after fiscal 1990, Section 318 remains pertinent to the 16 sales.

dismissed in 1989, and that its claims under the OCLA and the MBTA were meritless. The district court denied the parties summary judgment on the FLPMA claim, which remains pending. *Portland Audubon Society* v. *Lujan*, No. 87-1160-FR (D. Or. May 8, 1991), *reprinted at* Br. in Opp. App. 88a-104a, appeal pending, No. 91-35762 (9th Cir.).

SUMMARY OF ARGUMENT

1. A cardinal principle of constitutional adjudication is that, if fairly possible, statutes should be construed to avoid constitutional difficulties. See, *e.g.*, *Communications Workers* v. *Beck*, 487 U.S. 735, 762 (1988). Here, the court of appeals rejected an entirely plausible (and, indeed, the most straightforward) reading of Section 318 —that it establishes a temporary modification of legal standards governing the management of designated public lands by specifying the required plans and providing that they should not be impeded by the operation of other environmental statutes.

This congressional intent is plain both from a consideration of Section 318 without regard to the first sentence of Section 318(b)(6)(A) and from a consideration of that sentence itself. As a whole, Section 318 establishes mandatory timber sale levels for fiscal 1990 (§ 318(a)), specifies environmental procedures for those mandatory sales (§ 318(b)), and provides a variety of other timber sales-related procedures (§ 318(c)-(k)). The second sentence of Section 318(b)(6)(A), moreover, provides that there shall be no judicial review of the (b)(3) and (b)(5) guidelines—a directive plainly violated by the court of appeals' ultimate conclusion that the (b)(3) and (b)(5) guidelines may be measured against other environmental statutes to determine their adequacy.

Like Section 318 as a whole, the first sentence of Section 318(b)(6)(A) is perfectly consistent with the understanding that Section 318 is a temporary modification of environmental laws, providing the procedures to govern federal land management in the designated area for one

year without impediment from other environmental statutes. The court of appeals' conclusion to the contrary rests on several misconceptions. These include a misapprehension about the significance of the statutory reference to these cases, an overly simplistic dichotomy regarding possible congressional actions that fails to take into account "deeming" provisions and conclusive presumptions, an erroneous conclusion that the statute requires the entry of judgment and findings, and a mistaken assumption that the first sentence must be interpreted as a directive to the courts, rather than to executive agencies.

Finally, the court of appeals' ultimate interpretation—in which the specified standards simply apply in addition to the other, pre-existing statutory requirements—is plainly contrary to Congress's intent in fashioning a one-year compromise to streamline timber sales and avert a looming crisis. The court's interpretation severely distorts the nature and effect of that compromise.

2. In addition to misreading the statute, the court misconstrued Article III and *United States* v. *Klein*. Article III plays a limited role in restraining Congress's ability to enact legislation that affects pending cases. Numerous constitutional provisions—the Due Process Clause, the equal protection component of that Clause, the Takings Clause, and the Bill of Attainder and Ex Post Facto Clauses—address aspects of this issue, and Article III does not function as a general backstop to these provisions. Instead, Article III performs an important, but limited, mission of protecting the adjudicative function.

Contrary to the court of appeals' conclusion, the first sentence of Section 318(b)(6)(A) presents no invasion of the adjudicative function. The sentence provides, at most, a legal characterization, operating as a deeming provision or conclusive presumption. Such congressionally specified legal characterizations are merely a form of prescribing governing substantive legal standards—a legis-

lative function that does not impinge on the adjudicative function. Because Congress's expressed objective—that the (b)(3) and (b)(5) guidelines would operate unimpeded by other environmental statutes—is constitutional, Congress's choice of language in expressing that permissible objective should not determine its constitutional validity. Cf. *United States* v. *Ptasynski*, 462 U.S. 74, 86 (1983). Because Congress was providing the standards for management of the public lands, moreover, its authority was especially broad, see Art. IV, § 3, Cl. 2; *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 580 (1987). Indeed, the court of appeals impermissibly intruded on the congressional responsibility for the management of public lands.

United States v. *Klein* does not require a different conclusion. *Klein* is distinguishable from the instant case in several important respects. Unlike *Klein*, this case presents no issue concerning vested property rights, no issue concerning an unconstitutional objective by Congress, and no issue concerning manipulation of jurisdiction to achieve an unconstitutional objective. Although *Klein* contains some broad and ambiguous language, the decision should, consistent with established principles of constitutional interpretation, be given a careful reading, appropriately limited by the issues presented in the case itself. *Klein* clearly establishes that Congress may not impinge upon the pardon power; that, in certain circumstances, there may be judicial review of limitations on this Court's jurisdiction; and that Congress may not manipulate this Court's appellate jurisdiction in such a manner that the Court becomes the means through which Congress unconstitutionally infringes on the pardon power. *Klein* does not, however, require invalidation of Congress's temporary modification, in Section 318, of the standards governing the management of designated public lands.

ARGUMENT

I. THE COURT OF APPEALS MISCONSTRUED SECTION 318

It is a fundamental principle of constitutional adjudication that "federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and that when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Communications Workers* v. *Beck*, 487 U.S. 735, 762 (1988). This Court has repeatedly reiterated this requirement, and its importance.[16] The principle is rooted in judicial respect for the other Branches and in a deep-seated reluctance to invalidate legislation, or parts of legislation, unless absolutely necessary. See, *e.g.*, *Edward J. DeBartolo Corp.*, 485 U.S. at 575; *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

Although the court of appeals acknowledged this principle (Pet. App. 15a), the court's analysis fails to honor it. The court agreed that, if Congress had used different language with respect to the applicability of other environmental statutes, Congress could have established Section 318, precisely as written in all other respects, as a comprehensive, one-year plan for public land manage-

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[16] See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act."); *Hooper* v. *California*, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.").

ment that would proceed regardless of those other environmental statutes. Pet. App. 14a-16a. The court nevertheless invalidated the first sentence of Section 318(b)(6)(A) as an unconstitutional intrusion on the Judiciary within the meaning of *United States* v. *Klein*, *supra*, and held that other environmental statutes apply in full to the Section 318 requirements. Pet. App. 12a-16a.

To reach that conclusion, the court of appeals read the first sentence of Section 318(b)(6)(A) to embody an "actual direction of a particular decision in a case" (Pet. App. 11a) to the courts. But this reading of Section 318 is not the most straightforward reading of the provision; it contradicts the language and structure of the provision; and it can easily be avoided to save the provision from any constitutional infirmity.

To understand the flaws in the court of appeals' interpretation, it is instructive to consider (1) the language and structure of Section 318 without regard to the first sentence of Section 318(b)(6)(A); (2) the first sentence of Section 318(b)(6)(A); and (3) the compromise nature of Section 318.

A. Section 318 Provides A Temporary Modification Of Statutory Requirements For Designated Public Lands

The most straightforward reading of Section 318 is that it provides alternative standards or plans for Forest Service and BLM timber sales in the designated areas for fiscal year 1990. When the Section is considered without regard to the first sentence of Section 318(b)(6)(A), it is plain that Congress intended to establish the procedures that would govern timber sales on a one-year basis and on specified public lands, and that Congress intended that these procedures would not be impeded or modified by the applicability of other environmental statutes.

Section 318(a) definitively sets the amount of timber sales from Forest Service and BLM lands in Oregon and

Washington. See § 318(a)(1) ("The Forest Service *shall* offer * * *.") (emphasis added); § 318(a)(2) ("The Bureau of Land Management *shall* offer * * *.") (emphasis added). Section 318(b) then establishes the guidelines for the sales—requiring minimization of fragmentation of ecologically significant old growth forest stands (§ 318(b)(1)); specifying procedures for addressing any fragmentation necessary to meet the amounts required by Section 318(a) (§ 318(b)(2)); expanding the protected areas in the Forest Service and BLM administrative plans and adopting the modified plans as statutory law (§ 318(b)(3) and (b)(5)); specifying standards for Forest Service selection of sites (§ 318(b)(4)); and providing that the "guidelines adopted by subsections (b)(3) and (b)(5) shall not be subject to judicial review by any court of the United States." § 318(b)(6)(A) (second sentence).

Additional provisions further elaborate the required procedures. Among other things, the provisions require the creation of advisory boards, which would include business and environmental representatives, for consideration of proposed timber sales (§ 318(c)); streamline the administrative appeal process with respect to individual sales (§ 318(d)); and provide for limited judicial review of individual sales (§ 318(g)).

Without regard to the first sentence of Section 318(b)(6)(A), then, Section 318 clearly can be read as establishing a temporary modification of the governing legal requirements, on a one-year basis, for specified public lands. Rather than by the panoply of existing statutes, the management of these lands would be governed by the highly specific legislation addressed to this particular problem. Section 318 orders the Forest Service and BLM to offer sales that conform to statutory guidelines set forth in subsections (b)(3) and (b)(5), and provides that those statutory guidelines are not subject to judicial review.

Indeed, even after the court of appeals initially issued its decision, the *Seattle Audubon* district court viewed

this reading of Section 318 as sufficiently plausible that it sent a letter to the court of appeals requesting clarification of the court of appeals' decision. The letter stated, in pertinent part:

> Congress appears to have intended that Section 318's standards would preempt the field as to 1990 sales. However, the question now arises whether it achieved that, in light of the Court of Appeals September 18 decision. The issue is that: Does Section 318 contain in full the substantive standards the Forest Service must meet as to 1990 sales in the forests covered by the statute? Or does [the] agency have to comply with both the requirements of Section 318 *and* any that may exist under general statutes such as the National Forest Management Act?

Br. in Opp. App. 137a-138a. The court of appeals responded by amending its decision to explain that the provisions in Section 318 "add additional requirements," and do not "repeal or amend" the other environmental statutes with respect to the Section 318-mandated procedures. See Br. in Opp. App. 138a; Pet. App. 3a-4a.

By responding in such a fashion, the court of appeals eschewed a plainly available interpretation of Section 318 that would obviate any constitutional problem—the conclusion that, as the district court put it in its letter, "Congress * * * intended that Section 318's standards would preempt the field as to 1990 sales," Br. in Opp. App. 137a, on the specified public lands. To be sure, an important aspect of the court of appeals' conclusion was its reading of the first sentence of Section 318(b)(6)(A) itself, a reading that will be addressed shortly. For present purposes, however, it is important to underscore that nothing in the rest of Section 318 precludes a conclusion that Congress intended Section 318 to establish a temporary modification of the environmental laws for the public lands at issue, and, indeed, the highly detailed, fully integrated procedures set forth in Section 318 counsel strongly in favor of that interpretation.

In considering the meaning of Section 318 without regard to the first sentence of Section 318(b)(6)(A), moreover, it must be emphasized that the court of appeals' ultimate holding—that, even if the Forest Service and BLM are in perfect compliance with Sections 318(b)(3) and (b)(5), the (b)(3) and (b)(5) guidelines may be found to violate other environmental statutes—is flatly inconsistent with the second sentence of Section 318(b)(6)(A). That sentence provides, in its entirety, that "[t]he guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." App., *infra*, 6a. A natural reading of this provision is that it insulates the guidelines mandated by subsections (b)(3) and (b)(5) from judicial review. Under the court of appeals' view, however, subsections (b)(3) and (b)(5) simply exist in addition to all other existing statutory requirements. Thus, under the court of appeals' view, a challenge to individual timber sales may be brought on the ground that, even if the BLM and Forest Service follow subsections (b)(3) and (b)(5) to the letter, that adherence is itself inadequate—and may be rejected by federal courts—because the guidelines mandated by Section 318(b)(3) and (b)(5) are not sufficient to comply with other statutes. This is precisely the challenge that prevailed in the wake of the court of appeals' decision, and that led to the district court's enjoining 16 Forest Service sales in the *Seattle Audubon* litigation. See Br. in Opp. App. 85a-86a; *id.* at 126a-143a. The court of appeals' analysis permits judicial review of whether the actions required by Sections 318(b)(3) and (b)(5) satisfy other environmental statutes—a clear conflict with the second sentence of Section 318(b)(6)(A).[17]

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[17] The court of appeals' opinion never addresses the meaning or role of the second sentence of Section 318(b)(6)(A); it states only

Far from representing the only possible reading of Section 318, the court of appeals' conclusion—that the Section 318 specifications are simply additions to existing statutory requirements—represents a strained construction. The critical question thus becomes whether the first sentence of Section 318(b)(6)(A) compels that interpretation.

B. The First Sentence of Section 318(b)(6)(A) Does Not Direct A Court To Decide A Case

The court of appeals not only failed to appreciate the significance of the other provisions of Section 318; it also misconstrued the first sentence of Section 318(b)(6)(A) itself.

The language of Section 318(b)(6)(A) that the court of appeals held unconstitutional is:

> the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the [cases brought by the Seattle Audubon and Portland Audubon respondents].

Rather than a directive to the courts to enter judgment, it is appropriate to interpret this language, taken together with subsections (b)(3) and (b)(5), as the

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that the court "express[es] no opinion on the validity of the second and final sentence of subsection (b)(6)(A)." Pet. App. 17a n.4.

We emphasize that it is not our position that Section 318 precludes *all* judicial review of fiscal year 1990 timber sales. Section 318(g) provides that individual sales can be challenged on the ground that the sale is "arbitrary, capricious, or not in accordance with law." The category of "not in accordance with law" would include (1) claims related to compliance with Section 318 itself, and (2) statutory and constitutional claims unrelated to the adequacy of the (b)(3) and (b)(5) guidelines.

district courts did: as consistent with a temporary substitution of alternative standards for those otherwise applicable under the environmental laws. Under this reading, just as Sections 318(b)(3) and (b)(5) are substitute guidelines for the plans the agencies had developed, so too the quoted language from Section 318(b)(6)(A) can be read as a declaration that Congress is satisfied with those statutory plans and guidelines, and as a directive that the Forest Service and BLM should not attempt to make an independent evaluation of their statutory sufficiency in preparing fiscal year 1990 timber sales.

The court of appeals' contrary interpretation proceeds from a series of flawed assumptions. First, the court assumed that the first sentence of Section 318(b)(6)(A) represents an attempt "to instruct federal courts to reach a particular result in pending cases identified by caption and file number." Pet. App. 9a. The court misapprehends the meaning of the statute's reference to the particular cases. Although they are "identified by caption and file number," that identification is not in the context of a command to decide the cases. Rather, the cases are enumerated to identify certain statutes—the statutes "that are the basis" for those cases (namely, NEPA, FLPMA, OCLA, MBTA, and NFMA). The naming of the cases in the statute, although perhaps unusual, is thus not materially different from enumerating the statutes themselves, and the court of appeals incorrectly ascribed significance to the use of the case names.

Second, the court assumed that congressional enactments that affect pending litigation can be divided into a simple dichotomy—either a permissible repeal or amendment of existing legislation, or an impermissible direction of the outcome of a case. See, *e.g.*, Pet. App. 11a ("[T]he critical distinction, for purposes of deciding the limits to Congress' authority to affect pending litigation through statute, is between the actual repeal or amendment of the law underlying the litigation, which is per-

missible, and the actual direction of a particular decision in a case, without repealing or amending the law underlying the litigation, which is not permissible."). The court's dichotomy, however, fails to take into account the entire category of legislation in which Congress deems certain conditions to satisfy, or be within the reach of, pre-existing statutes.[18] This familiar category is a species

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[18] See, *e.g.*, Pub. L. No. 89-554, § 1, 80 Stat. 425 (1966) ("An employee detailed under subsection (b) of this section is deemed, for the purpose of preserving his allowances, privileges, rights, seniority, and other benefits, an employee of the agency from which detailed, and he is entitled to pay, allowances, and benefits from funds available to that agency. The authorization and payment of these allowances and other benefits from appropriations available therefor is deemed to comply with section 5536 of this title."); Pub. L. No. 92-318, § 506(m), 86 Stat. 352 (1972) ("With respect to the Virgin Islands and Guam, the enactment of this section shall be deemed to satisfy any requirement of State consent in laws or provisions of law referred to in this section."); Pub. L. No. 98-473, 98 Stat. 1954 (1984) ("*Provided* * * * That, for the purposes of section 710 of the Regional Rail Reorganization Act of 1973, as added by section 1143 of the Northeast Rail Service Act of 1981, such sum shall be considered to have been appropriated under section 713 of the Regional Rail Reorganization Act of 1973 and counted against the limitation on the total liability of the United States."); Pub. L. No. 99-662, § 204, 100 Stat. 4099 (1986) ("Any plan of improvement proposed to be implemented in accordance with this subsection shall be deemed to satisfy the requirements for obtaining the appropriate permits required under the Secretary's authority."); Pub. L. No. 100-440, § 631, 102 Stat. 1759 (1988) ("For purposes of section 1886 of the Social Security Act, Missouri Baptist Hospital of Sullivan in Sullivan, Missouri is deemed to be located in Franklin County, Missouri, retroactively effective for discharges beginning on or after December 22, 1987."); Pub. L. No. 102-624, § 1736, 104 Stat. 3793 (1990) ("The signature of the adult under this section shall be deemed sufficient to comply with any provision of Federal law requiring household members to sign the application or statements in connection with the application process.").

Indeed, at least twenty-nine statutes concerning federal land management alone specifically deem congressional specification to satisfy other environmental statutes. See Pub. L. No. 101-401, § 5(b)(2), 104 Stat. 864 (1990); Pub. L. No. 101-195, § 5(b)(2), 103 Stat. 1786 (1989); Pub. L. No. 100-547, § 202, 102 Stat. 2738 (1988);

of the use of a so-called conclusive or irrebuttable presumption, a legislative drafting device that prescribes a substantive legal rule rather than a presumption in the true sense.[19]

Indeed, the reach of the court of appeals' analysis is unclear with respect to the category of "deeming" legislation. Two alternatives are possible: either (1) this entire category is impermissible because Congress is constitutionally barred from enacting legislation that deems compliance with, or satisfaction of, other statutes, or (2) this category is permissible, but, if Congress mentions a pending case, the legislation is impermissible. Both alternatives are untenable—the first would significantly and unjustifiably constrict Congress's authority to enact substantive legislation, and the second rests on a meaningless distinction. Thus, the court of appeals' assumption of a rigid dichotomy—that, if the first sentence of Section

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Pub. L. No. 100-499, § 6(b)(2), 102 Stat. 2493 (1988); Pub. L. No. 100-184, § 6(b)(2), 101 Stat. 1276 (1987); Pub. L. No. 99-504, § 104(b), 100 Stat. 1803 (1986); Pub. L. No. 99-490, § 5(b)(2), 100 Stat. 1236 (1986); Pub. L. No. 98-586, § 5(b)(2), 98 Stat. 3107 (1984); Pub. L. No. 98-578, § 5(b)(2), 98 Stat. 3089 (1984); Pub. L. No. 98-550, § 401(b)(2), 98 Stat. 2811 (1984); Pub. L. No. 98-515, § 5(b)(2), 98 Stat. 2421 (1984); Pub. L. No. 98-514, § 5(b)(2), 98 Stat. 2417 (1984); Pub. L. No. 98-508, § 4(b), 98 Stat. 2351 (1984); Pub. L. No. 98-430, § 6(b)(2), 98 Stat. 1667-1668 (1984); Pub. L. No. 98-428, § 201(b), 98 Stat. 1659-1660 (1984); Pub. L. No. 98-425, § 111(b), 98 Stat. 1628 (1984); Pub. L. No. 98-406, § 103(b)(2), 98 Stat. 1490 (1984); Pub. L. No. 98-339, § 5(b)(2), 98 Stat. 303 (1984); Pub. L. No. 98-328, § 5(b), 98 Stat. 278 (1984); Pub. L. No. 98-324, § 5(b), 98 Stat. 265 (1984); Pub. L. No. 98-323, § 104(b), 98 Stat. 260 (1984); Pub. L. No. 98-322, § 105(b)(2), 98 Stat. 255 (1984); Pub. L. No. 98-321, § 5(b), 98 Stat. 251 (1984); Pub. L. No. 98-140, § 3(a)(2), 97 Stat. 902 (1983); Pub. L. No. 97-466, § 5(b)(2), 96 Stat. 2541 (1983); Pub. L. No. 97-407, § 5(b)(2), 96 Stat. 2034 (1983); Pub. L. No. 97-384, § 4(b)(2), 96 Stat. 1942-1943 (1983); Pub. L. No. 96-560, § 107(b)(2), 94 Stat. 3270-3271 (1980); Pub. L. No. 96-487, § 708(b)(2), 94 Stat. 2421 (1980).

[19] See *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 395 (1984) (relying on legislative deeming provision even though it is an "express legal fiction").

318(b)(6)(A) is found not to be a repeal or amendment of existing legislation, it is necessarily an impermissible direction of the outcome of a case—is erroneous.[20]

Third, the court erroneously assumed that the first sentence of subsection (b)(6)(A) directs the entry of judgments and of findings of fact. In the court's view, the pertinent sentence "directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court." Pet. App. 14a. Not so. The sentence does not, by its terms, direct the entry of any particular findings or any particular decision. Instead, the sentence is a legislative "deeming" of statutory compliance, just as in other statutes. See notes 18, 19, *supra*. To be sure, Section 318 affects the outcome of these cases in at least three ways. It eliminates the relevance of the Forest Service and BLM administrative decisions—the focus of respondents' initial challenge—to the fiscal 1990 sales (because it modifies the administrative plans and makes them statutory law); it precludes judicial review of the (b)(3) and (b)(5) guidelines (through the second sen-

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[20] It is instructive to consider the possible legislative formulations of Section 318. Under the court of appeals' analysis, it clearly would have been permissible if Congress had enacted precisely the same legislation (except the first sentence of Section 318(b)(6)(A)) and included, "Notwithstanding any other provision of law" before (b)(3) and (b)(5); in doing so, Congress would have permissibly ensured that the (b)(3) and (b)(5) guidelines would proceed unimpeded by other environmental statutes. At the same time, under the court of appeals' analysis, Congress's attempt to ensure that result by the wording it actually used was impermissible. The court does not make clear on which side of its dichotomy it would place the following two hypothetical examples: (1) Congress includes five separate provisions, to be codified in NEPA, FLPMA, MBTA, OCLA, and NFMA, specifying, "*Provided*, that the above requirements are satisfied by the guidelines in (b)(3) and (b)(5) of Section 318 of the Department of the Interior and Related Agencies Fiscal 1990 Appropriations Act," or (2) Congress simply names the five statutes in Section 318(b)(6)(A), rather than naming the cases in which they are raised. These examples highlight the artificiality of the court of appeals' rigid dichotomy.

tence of (b)(6)(A));[21] and, if the question of the sufficiency of the (b)(3) and (b)(5) guidelines is nevertheless reached, it establishes that the (b)(3) and (b)(5) guidelines are deemed in compliance with the other statutory requirements. But the legislation reaches these results through changes in the law, not through direction of the outcome of a pending case.

Further support for the conclusion that Congress was not directing the outcome of a case is provided by the first clause of the first sentence of Section 318(b)(6)(A). As noted, at the time that the legislation was enacted, respondents' challenge was to the BLM and Forest Service administrative documents. In the first phrase of the first sentence of (b)(6)(A), Congress specifies that it is not "passing on the legal and factual adequacy" of those documents. Before modifying the administrative plans and adopting them as statutory law for one year, Congress thus makes clear that the administrative documents themselves have received no congressional imprimatur, thereby leaving open the possibility of judicial challenges to those documents after the one-year period covered by Section 318.[22]

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[21] The fact that the second sentence of 318(b)(6)(A) precludes judicial review of the (b)(3) and (b)(5) guidelines demonstrates that, far from directing the decision of a case and the entry of findings, Congress is actually *disabling* courts from reaching the question whether, for fiscal 1990, the (b)(3) and (b)(5) guidelines satisfy other statutes.

[22] See also H.R. Conf. Rep. No. 264, *supra*, at 88 (Section 318 "should not be construed to moot future action after fiscal year 1990."); *id.* at 89 ("Nothing in this section is intended to prejudge * * * any future decision * * * that may be reached by a Federal court in the *Seattle Audubon/Washington Contract Loggers Assoc. v. Robertson* cases and the *Portland Audubon v. Lujan* case.").

The court of appeals believed that another sentence in the conference report provided "mixed signals" with the statement that Congress was not passing on the validity of the administrative documents. See Pet. App. 16a n.3 (quoting conference report statement that Section 318 "in no way alters application of the

Fourth, and even more fundamentally, the court of appeals incorrectly assumed that the first sentence of Section 318(b)(6)(A) must be considered a "directive from Congress *to the courts*." Pet. App. 13a (emphasis added). An equally plausible construction of the sentence —and, indeed, more plausible construction—is that the sentence is a directive to the Forest Service and BLM, confirming that, for fiscal 1990 sales, they should not engage in additional considerations beyond those specified in the (b)(3) and (b)(5) guidelines. Under this reading, the first sentence of (b)(6)(A) is directed to the agencies, and the second sentence—prohibiting judicial review of the adequacy of the (b)(3) and (b)(5) guidelines—is directed to the courts. The wording of the provision strongly supports this interpretation. In the first sentence, Congress uses the term "directs"; Congress employs a different tense of that verb in two other places in Section 318, both times with regard to executive agencies. See § 318(b)(6)(B) ("The Forest Service is *directed* * * *.") (emphasis added); § 318(h) (Forest Service, BLM, and Fish and Wildlife Service reports "shall be submitted as *directed*") (emphasis added). Without using that verb, moreover, Section 318 contains other explicit directives to executive branch agencies (*e.g.*, § 318(c)(2); § 318(f)(1)). Furthermore, the first sentence states that the (b)(3) and (b)(5) guidelines are "adequate consideration" for the purpose of meeting environmental statutes, and it is natural to read that term

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Endangered Species Act or other environmental laws to Forest Service and BLM management activities"). But there is no inconsistency. As noted, the first sentence of (b)(6)(A) operates as a deeming provision (cf. pp. 25-28 & notes 18, 19, *supra*); it provides that the (b)(3) and (b)(5) standards satisfy certain enumerated environmental statutes. There is no contradiction between such a deeming provision and the conclusion that Congress's temporary substitution of standards does not preclude further judicial challenge to the adequacy of pre-existing administrative documents.

as addressed to the agencies that would be engaged in that consideration.

Thus the court of appeals' conclusion that the first sentence of Section 318(b)(6)(A) is an impermissible directive to the judiciary—rather than a statement that Congress is satisfied that the (b)(3) and (b)(5) guidelines provide adequate protection and should be considered to occupy the field—rests on a series of erroneous assumptions.

C. The Court of Appeals' Interpretation Distorts The Congressional Compromise

In addition to misconstruing Section 318 as a whole and the first sentence of Section 318(b)(6)(A) in particular, the court of appeals' interpretation also inflicts considerable damage on Congress's carefully constructed compromise.

In Section 318, Congress was not unilaterally favoring timber interests (or the Executive Branch) and thwarting respondents. Instead, Congress took several steps to enhance environmental protection. Congress significantly modified the existing administrative plans and added new areas to protected Forest Service and BLM lands. In Sections 318(b)(1) and (b)(2), Congress required that fragmentation of ecologically significant old growth stands be minimized, and in Section 318(b)(4), it required that the Forest Service exercise discretion and assign priority in timber sale location near SOHAs "in order to retain spotted owl habitat characteristics." In a highly unsual provision, Congress, in Section 318(f), gave the Seattle Audubon respondents authority to participate in the designation of certain Forest Service lands for timber sales. See note 11, *supra*.[23] At the same time, Congress mandated total timber sales of 9.6 billion board

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[23] Congress also required that environmental groups be included on advisory boards to evaluate proposed timber sales. § 318(c).

feet,[24] and provided streamlined administrative and judicial review procedures (§ 318(d) and (g)).

In enacting Section 318, Congress clearly sought to fashion a compromise in order to avert a crisis that loomed over the Pacific Northwest. The legislative history reveals both the compromise nature of the legislation,[25] and the perceived crisis that it was intended to prevent.[26]

The court of appeals' interpretation—in which the (b)(3) and (b)(5) guidelines now simply apply *in addition to* all of the existing other requirements—radically distorts this compromise. Although Congress clearly

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[24] The court of appeals incorrectly stated the total as 7.7 billion board feet. Pet. App. 6a. That is the amount for the Forest Service, and the BLM was required to sell an additional 1.9 billion board feet. See § 318(a)(1); § 318(a)(2).

[25] See, *e.g.*, 135 Cong. Rec. H6506 (daily ed. Oct. 3, 1989) (Rep. AuCoin) ("The compromise in this appropriation addresses that mistake, that colossal policy breakdown, that has us in this dispute between those advocates of the spotted owl and those who are trying to protect the industry, and I include myself in the ranks of both."); *id.* at H6507 (Rep. Dicks) ("I can guarantee you this compromise is not pleasing everybody, but under the circumstances I think we did the best job that we could."); *id.* at H6509 (Rep. Vento) ("[T]his compromise on old growth is necessary today so that the stalemate in the Pacific Northwest is placed on the path of solution."); 135 Cong. Rec. S12,964 (daily ed. Oct. 7, 1989) (Sen. Gorton) ("[T]his amendment represents a thoughtful and balanced process.").

[26] See, *e.g.*, 135 Cong. Rec. H6506 (daily ed. Oct. 3, 1989) (Rep. AuCoin) ("[W]e are here because nothing less than the Northwest economy and the Pacific Northwest environment are at stake."); *id.* at H6509 (Rep. Vento) ("We have ended up in a quagmire of court cases and a stalemate that has resulted in severe economic and environmental problems in the Pacific Northwest."); 135 Cong. Rec. S12,961 (daily ed. Oct. 7, 1989) (Sen. Adams) ("Small towns have disappeared. Others are in desperate straits. * * * [T]he severity of the crisis this year did not give us the luxury of time to slowly mull over this issue. Mills were shutting down. Jobs were threatened and gone. Our State was being torn apart, and tensions were rising with the very real potential of violence.").

sought to streamline the administrative and judicial process through its statutory plan, the court of appeals' interpretation has the effect not of providing a comprehensive plan (as Congress plainly intended), but rather, ironically, of *adding* further to the existing patchwork of statutory requirements. Neither the language nor the structure of Section 318 compels this result, and the canon of construing statutes in favor of their constitutionality points strongly in the other direction. Rather than an intrusive command to the judiciary, Section 318 should properly be construed as a one-year, comprehensive plan for managing designated public lands—an objective that the court of appeals itself concluded could have been achieved through other language. Pet. App. 12a-16a.[27]

II. SECTION 318 CONTAINS NO VIOLATION OF ARTICLE III

In addition to its error of statutory construction, the court of appeals' constitutional analysis was severely flawed. The court failed to recognize that Article III plays a limited role in addressing the issue of the effect

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[27] The court of appeals stated that it could not interpret Section 318 as a temporary modification of the environmental laws because Congress cannot impliedly repeal statutes in appropriations Acts. Pet. App. 16a. In so ruling, it claimed to follow this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978). In *Hill*, however, the Court invoked the strong presumption against "repeal by implication" in circumstances where no statutory language whatsoever exempted the federal project from the requirements of the Endangered Species Act; only legislative history called for that result. The Court's opinion leaves no room for doubt that it would have sustained the exemption *if* it could be found in the text enacted into law. 437 U.S. at 189-191, 193. Thus, the court of appeals' invocation of *Hill* is erroneous. It is settled that Congress can enact substantive law, and modify statutory provisions, in appropriations legislation. See, *e.g.*, *United States* v. *Will*, 449 U.S. 200, 222 (1980); *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940). See also *Metro Broadcasting, Inc.* v. *FCC*, 110 S. Ct. 2997, 3016 n.29 (1990).

of legislative enactments on pending cases, that Article III is not violated by the first sentence of Section 318 (b)(6)(A), and that *United States* v. *Klein* does not require a contrary conclusion.

A. Article III Plays A Limited Role In the Constitutional Constraints On Congress's Ability To Affect Pending Cases

The court of appeals viewed the issue of Congress's ability to affect pending cases as a broad question of Article III jurisprudence. See Pet. App. 9a-15a. In fact, however, numerous constitutional constraints restrict Congress's ability to affect pending cases, and Article III plays a limited role within that structure.

It is well established that Congress may enact a statute that changes the law and thereby affects pending cases. As Chief Justice Marshall explained in the seminal case of *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801):

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of an appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation.

Although there has been disagreement regarding the appropriate canon of interpretation to determine whether Congress intended retroactivity,[28] it is beyond dispute that Congress may constitutionally specify that its enactments changing substantive law are to be applied retroactively.

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[28] See *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 110 S. Ct. 1570, 1576-1578 (1990); *id.* at 1579-1585 (Scalia, J., concurring); *id.* at 1591-1594 (White, J., dissenting).

See *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 396 (1989); *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 728-731 (1984); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976).

Various constitutional provisions restrict this legislative ability to change the law and affect pending cases. The Due Process Clause requires a rational legislative purpose for the retroactive application of new legislation.[29] The equal protection component of the Due Process Clause prohibits invidious or arbitrary discrimination.[30] The Takings Clause requires just compensation for a taking of property.[31] The Ex Post Facto Clause provides that Congress may not enact a law that imposes punishment retroactively,[32] and the Bill of Attainder Clause provides that Congress may not legislatively determine guilt and inflict punishment upon an identifiable individual without the protection of a judicial trial.[33]

Those provisions provide a structured and well-defined inquiry into Congress's ability to affect pending litigation. The role of Article III is not as a back-up for those specific provisions, addressing the same subject a second time if no violation of the directly pertinent provision has been found. When these provisions speak to a particular issue, Article III should not be invoked in an attempt to provide a different answer to the same inquiry.[34]

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[29] *E.g.*, *United States* v. *Sperry Corp.*, 110 S. Ct. at 396; *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. at 728-731; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 14-20.

[30] *E.g.*, *Lyng* v. *Castillo*, 477 U.S. 635 (1986); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

[31] *E.g.*, *Bowen* v. *Gilliard*, 483 U.S. 587, 603-609 (1987).

[32] *E.g.*, *Miller* v. *Florida*, 482 U.S. 421 (1987); *Weaver* v. *Graham*, 450 U.S. 24 (1981).

[33] *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977).

[34] Cf. *Graham* v. *Connor*, 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of con-

Article III nevertheless has an important role to play in determining Congress's ability to affect pending litigation. Article III, by vesting the "judicial Power" in the judiciary (Art. III, §§ 1, 2), protects against invasion of the adjudicative function. One example of such an invasion would be a congressional specification of a finding of fact from the record in a particular case or controversy; it would *not* prohibit, however, a congressional specification of the significance, or legal characterization of, a finding of fact.[35] Another example would be a provision that the judiciary must reach a decision in violation of the Constitution. Cf. *Yakus* v. *United States*, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) (requiring courts to "enforce unconstitutional laws or statutes" would violate "the constitutional integrity of the judicial process").

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stitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."); *Whitley* v. *Albers*, 475 U.S. 312, 327 (1986) ("[T]he Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners * * * where the deliberate use of force is challenged as excessive and unjustified.").

[35] An example may illustrate the difference between these two possible congressional actions. Suppose that Congress passes a statute requiring means testing for Social Security benefits and prohibiting benefits for "citizens who are self-sufficient"; Congress then amends the statute to provide that, "Any individual found to possess a yacht shall be deemed to be self-sufficient for purposes of the Social Security Act, and this provision shall apply to all pending cases." Because Congress is changing the legal characterization and significance of a fact—yacht ownership—no Article III problem is presented. If Congress, however, enacted legislation providing that, "In the case of *George Jones* v. *Secretary of Health & Human Services*, the court shall find that George Jones owns a yacht," a serious Article III problem would be presented because Congress, by specifying a factual finding from the evidentiary record in a particular case, would be invading the court's adjudicative function.

Article III thus should not be interpreted to substitute for the coverage of other constitutional provisions and to undermine the structured analysis provided by those provisions; Article III does stand, however, as a prohibition against congressional invasion of the adjudicative function itself.

B. The First Sentence of Section 318(b)(6)(A) Does Not Violate Article III

Respondents do not contend that the first sentence of Section 318(b)(6)(A) violates due process or equal protection, nor do they contend that it constitutes a taking of property, a bill of attainder, or an ex post facto law. Clearly, any such claim by respondents would be unavailing. The provision is not irrational, arbitrary, or invidious, it takes no property, and it is not punitive. Respondents have no vested rights of any kind, and the provision relates solely to the prospective management of federal lands.

Respondents nevertheless contend—and the court of appeals concluded—that the first sentence of Section 318(b)(6)(A) violates Article III. But the first sentence of Section 318(b)(6)(A) presents no invasion of the adjudicative function. As has been discussed, Congress was enacting legislation to provide standards for the management of designated public lands in a particular fiscal year. That Congress chose to employ a deeming provision, or conclusive presumption, does not undermine the provision's validity, nor does it alter the fact that the disputed sentence represents, at most, a determination about the governing legal standard, rather than the "factual finding[]" perceived by the court of appeals (see Pet. App. 14a).

Deeming provisions, or other conclusive presumptions, are not inherently impermissible, and do not violate Article III. See, *e.g.*, *United States* v. *Locke*, 471 U.S. 84, 98-100 (1985) (giving effect to conclusive presumption in public lands case). To be sure, conclusive presump-

tions are subject to constitutional challenge as violations of due process. See, *e.g.*, *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 644-646 (1974); *Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972). But the conclusive presumption at issue in this case concerns the legal standards governing the management and disposition of certain government timber and forest lands for fiscal year 1990. Respondents have offered no constitutional challenge to the permissibility or reasonableness of the presumption itself, and, in fact, they have no liberty or property interest protectable under the Due Process Clause which would limit Congress's use of a conclusive presumption in defining compliance with such enactments.

The court of appeals' acknowledgment that Congress could have reached essentially the same result through different language is especially telling. Congress is not required to legislate with razor-sharp precision, and courts do not sit as editorial critics of legislative draftsmanship. So long as Congress's intent was clear through the statutory language (*i.e.*, its intent that the specified plan should proceed unimpeded by the applicability of other environmental statutes) and so long as that congressional goal itself violated no constitutional prohibition, the court had no warrant for blacklining the first sentence of Section 318(b)(6)(A) and eliminating it from the statute. So long as the expressed statutory objective is permissible, Congress is not required to engage in circumlocutions, or specialized terms of art, to achieve it.[36]

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[36] See, *e.g.*, *United States* v. *Ptasynski*, 462 U.S. 74, 86 (1983) ("Had Congress described this class of oil in nongeographic terms, there would be no question as to the Act's constitutionality. We cannot say that identifying the class in terms of its geographic boundaries renders the exception invalid. Where, as here, Congress has exercised its considered judgment with respect to an enormously complex problem, we are reluctant to disturb its determination."); *Pope* v. *United States*, 323 U.S. 1, 9 (1944) (rejecting claim that statute violated Article III, even though it was "inartistically drawn," because the permissible "purpose and effect" of the provi-

The court's misguided constitutional analysis is particularly egregious because the subject of the legislation was a prospective prescription for the management of public lands. The Constitution plainly assigns this responsibility to Congress. Art. IV, § 3, Cl. 2. Congress's authority with respect to the public lands is plenary. See, *e.g.*, *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 580 (1987); *Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976); *United States* v. *City and County of San Francisco*, 310 U.S. 16, 29-30 (1940). The courts enter this field only by authority of the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, or other statutes granting judicial review of agency action. The courts have no independent authority over the disposition of public property. *Light* v. *United States*, 220 U.S. 523, 537 (1911). By invalidating the first sentence of Section 318(b)(6)(A) and upsetting Congress's carefully considered plan for the management of these designated public lands, the court trenched on Congress's broad authority with respect to the public lands. As a consequence, it can fairly be stated that the separation of powers violation in this case is not, as the Ninth Circuit would have it, a congressional invasion of the judicial domain, but a judicial invasion of the congressional domain.

C. *United States* v. *Klein* Does Not Require A Conclusion That The First Sentence Of Section 318(b)(6)(A) Is Unconstitutional

The court of appeals relied extensively on *United States* v. *Klein* for its conclusion that the first sentence of Sec-

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sion were discernible); *In re Penn Central Transportation Co.*, 384 F. Supp. 895, 916 (Regional Rail Reorg. Ct. 1974) (Friendly, J.) ("[I]f Congress had worded the statute in either of the forms discussed, the commerce power would have permitted it, despite the uniformity clause * * *. Since what Congress did was not in violation of the Constitution, we decline to hold its action to have constituted a breach of the uniformity clause simply because it used words readily intelligible to its members and the public rather than circumlocutions that would have had exactly the same effect.").

tion 318(b)(6)(A) must be invalidated, and that the guidelines in (b)(3) and (b)(5) must be measured against other environmental statutes. In addition to its misinterpretation of Section 318, however, the court gave a substantially overbroad meaning to this Court's decision in *Klein*.

1. During the Civil War, Congress enacted the Abandoned Property Collection Act, ch. 120, 12 Stat. 820 (1863). The legislation authorized military authorities to seize and sell property found "in insurrectionary districts within the United States" and deposit the proceeds into the Treasury. 12 Stat. 820. The Act further provided that a former owner of such property could sue in the Court of Claims and obtain the net proceeds on proof of his former ownership, his right to the proceeds, and the fact that "he ha[d] never given any aid or comfort to the present rebellion." § 3, 12 Stat. 821. Also in 1863, President Lincoln issued a proclamation offering that, if persons who had participated in the rebellion (with some exceptions) would take an oath of allegiance, they would receive "a full pardon * * * with restoration of all rights of property." Proclamation No. 11, 13 Stat. 737 (1863).

In the wake of Grant's capture of Vicksburg, Union officers seized the cotton of Victor F. Wilson from his warehouse, sold it, and deposited the net proceeds of more than $125,000 in the United States Treasury. In February 1864, Wilson took the necessary oath and received a presidential pardon. Wilson died shortly thereafter, and, in 1865, Klein, the administrator of Wilson's estate, filed a petition to collect the proceeds from the sale of Wilson's cotton. The Court of Claims ultimately determined that the estate was entitled to recover the proceeds. *Kline* v. *United States (Wilson's Case)*, 4 Ct. Cl. 559, modified, 7 Ct. Cl. vii (1869). See generally Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States *v.* Klein *Revisited*, 1981 Wis. L. Rev. 1189,

1192-1193, 1197-1201; *Klein*, 80 U.S. (13 Wall.) at 130-132.

This Court subsequently held that receipt of a Presidential pardon established conclusive proof of loyalty and entitled the recipient to return of his property. *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870). In the wake of the *Padelford* decision (and while the government's appeal to this Court from the Court of Claims judgment in Klein's case remained pending), Congress enacted a statute providing that no presidential pardon should be admissible as proof of loyalty; that acceptance, without written protest or disclaimer, of a pardon reciting that the claimant took part in or supported the rebellion in fact should be conclusive evidence of the claimant's disloyalty; and that the Court of Claims and the Supreme Court must dismiss for want of jurisdiction any pending claims based on a Presidential pardon. Act of July 12, 1870, ch. 251, 16 Stat. 235; see *Klein*, 80 U.S. (13 Wall.) at 132-134, 143-144.

Accordingly, the United States asked this Court to dismiss the case with a mandate to the Court of Claims directing that it also dismiss the claim. Young, *supra*, 1981 Wis. L. Rev. at 1210 & n.113. This Court denied the motion to dismiss and affirmed the Court of Claims' judgment for Wilson's estate; in doing so, it declared the 1870 provision unconstitutional. *United States* v. *Klein*, *supra*.

The Court first noted that, by the terms of the pardon, property owners retained a continuing interest in their property after receipt of a pardon. "The restoration of the proceeds became the absolute right of the persons pardoned, on application within two years from the close of the war. It was, in fact, promised for an equivalent." 80 U.S. (13 Wall.) at 142. The Court then considered whether the Act of 1870 created a permissible exception to the appellate jurisdiction of the Supreme Court.[37]

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[37] Three years previously, this Court had upheld such an exception to the Court's appellate jurisdiction in *Ex parte McCardle*,

The Court rejected that proposition on the ground that the legislation "does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have." 80 U.S. (13 Wall.) at 145. The Court observed that "the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. * * * The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by denying the bill. * * * [T]he court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary." *Id.* at 146-147.

The Court further concluded that the congressional enactment violated the President's authority over pardons:

> The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.
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> * * * To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences. It may be granted on conditions. In these particular pardons, * * * restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.

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74 U.S. (7 Wall.) 506 (1869). The congressional debates on the 1870 legislation included reference to *McCardle*—and an apparent attempt to shape the legislation to conform to it—as Congress fashioned its response to the *Padelford* decision. See generally 6 C. Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-68*, at 842 (1971); Cong. Globe, 41st Cong., 2d Sess. 3814-3825 (1870). See also Young, *supra*, 1981 Wis. L. Rev. at 1201-1209.

> Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration.

80 U.S. (13 Wall.) at 147-148.

2. Several important distinctions between *Klein* and the case at hand are immediately apparent. The underlying question in *Klein* was the right to previously vested property; the underlying question in this case is prospective rules for the management of public lands for one year. *Klein* involved an exception to the appellate jurisdiction of this Court; this case involves no such question.[38] *Klein* involved an attempt to manipulate the subject matter jurisdiction of the courts in order to reach an unconstitutional result (infringement on the Executive's pardon power); this case involves no such unconstitutional result (and, indeed, it is conceded that Congress could have reached essentially the same result through different language).

The court of appeals nevertheless concluded that *Klein* requires invalidation of the first sentence of Section 318 (b)(6)(A). This interpretation is an overreading of *Klein*. To be sure, the *Klein* decision "is not a model of clarity."[39] In accordance with the settled principle that this Court does not "formulate a rule of constitutional law broader than is required by the precise facts to which it is applied," *Liverpool, New York & Philadelphia S.S.*

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[38] As we have pointed out, the second sentence of Section 318 (b)(6)(A) precludes judicial review of the (b)(3) and (b)(5) guidelines, but Section 318 permits judicial review of other statutory and constitutional claims, including compliance with Section 318 itself. See note 17, *supra*; § 318(g).

[39] P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 369 (3d ed. 1988). See also Eisenberg, *Congressional Authority To Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 526 (1974) ("The rationale underlying *Klein* is not clear.").

Co. v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885), however, the decision in *Klein* should not be given an unnecessarily broad construction.

In our view, three propositions are indisputably established by *Klein*, and are sufficient to sustain its holding. First, Congress may not impinge upon the Executive's pardon authority.[40] Second, congressional limitations on this Court's jurisdiction may, in certain circumstances, be subject to judicial review.[41] Third, Congress may not manipulate the appellate jurisdiction of this Court in such a manner that the Court becomes the means through which Congress unconstitutionally infringes on the pardon power.

A broader reading of *Klein* is both unnecessary and problematic. For example, although the opinion could be read expansively to suggest that Congress may never establish "rules of decision in * * * cases pending before [the judiciary]," 80 U.S. (13 Wall.) at 146, such an interpretation would undermine the basic principle of *The Schooner Peggy* and the permissibility of retroactive application of legislation.[42] Similarly, although *Klein* contains language which may be read as suggesting that the government cannot be favored by the retroactive applica-

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[40] This Court has consistently interpreted *Klein* as standing for that proposition, at least in part. See *Carlisle* v. *United States*, 83 U.S. (16 Wall.) 147, 152-153 (1873); *Hart* v. *United States*, 118 U.S. 62, 66-67 (1886); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 404-405 (1980). See also *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring in the judgment).

[41] See *Klein*, 80 U.S. (13 Wall.) at 145-146.

[42] See P. Bator *et al.*, *supra*, at 369 n.4 (*Klein* "should surely not be read as casting doubt on the ancient principle, clear since the decision in United States v. Schooner Peggy * * * that the courts are obligated to apply law (otherwise valid) as they find it at the time of their decision, including when a case is on review, the time of the appellate judgment."); *National Juvenile Law Center, Inc.* v. *Regnery*, 738 F.2d 455, 465 (D.C. Cir. 1984).

tion of legislation to pending litigation, see 80 U.S. (13 Wall.) at 146, Congress clearly has authority to enact retroactive legislation that favors the government, subject to various limitations.[43] *Klein* thus need not, and should not, be given an unduly broad reading.[44]

In this case, Congress specified the standards to govern the management of public lands, and acted well within its authority under the Property Clause. Nothing in *Klein*, or in Article III itself, precluded Congress from making such a determination, and the court of appeals erroneously invalidated that congressional enactment.

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[43] See, *e.g.*, *United States* v. *Sperry Corp.*, *supra*; *United States* v. *Heinszen & Co.*, 206 U.S. 370 (1907) (upholding legislation which provides retroactive ratification of previously unauthorized tariffs and which therefore requires dismissal of pending cases); *Rafferty* v. *Smith, Bell & Co.*, 257 U.S. 226 (1921) (retroactive ratification of previously unauthorized tax applies to cases pending before this Court); *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 415, 426-430 (1931).

[44] Although this Court has noted *Klein*'s language concerning a "rule of decision" in a pending case, it has not subsequently invalidated a statute on that ground. See *Sioux Nation of Indians*, 448 U.S. at 390-407 (holding that, in challenged statute, Congress permissibly waived res judicata defense); *Pope* v. *United States*, 323 U.S. at 13 (holding that challenged statute left courts with a "judicial function[]"). See also *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568 (1962) (plurality opinion).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CLIFFORD M. SLOAN
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MARTIN W. MATZEN
ANNE S. ALMY
Attorneys

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APPENDIX

Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 745-750 (1989), provides:

> (a) From funds appropriated under this Act or otherwise made available—
>
> > (1) The Forest Service shall offer, notwithstanding the provisions of the Federal Timber Contract Payment Modification Act of 1984 (16 U.S.C. 618(a)(5)(C)), an aggregate timber sale level of seven billion seven hundred million board feet of net merchantable timber from the national forests of Oregon and Washington for fiscal years 1989 and 1990. Such timber sales shall be consistent with existing land and resource management plans or land and resource management plans as approved except, in the case of the Mapleton Ranger District of the Siuslaw National Forest, Oregon, such sales shall be consistent with the preferred alternative of the draft land and resource management plan and accompanying draft environmental impact statement dated October 1, 1986, pending approval of a final land and resource management plan for the Siuslaw National Forest: *Provided*, That of the seven billion seven hundred million board foot aggregate timber sale level for fiscal years 1989 and 1990, timber sales offered from the thirteen national forests in Oregon and Washington

known to contain northern spotted owls shall meet an aggregate timber sale level for fiscal years 1989 and 1990 of five billion eight hundred million board feet of net merchantable timber: *Provided further*, That the sales volume shall be distributed in the same proportion between Oregon and Washington national forests known to contain northern spotted owls based on the average sale volume for fiscal years 1986 through 1988.

(2) The Bureau of Land Management shall offer such volumes as are required in fiscal year 1990 to meet an aggregate timber sale level of one billion nine hundred million board feet for fiscal years 1989 and 1990 from its administrative districts in western Oregon.

(b)(1) In accordance with subsection (b)(2) of this section, all timber sales from the thirteen national forests in Oregon and Washington known to contain northern spotted owls prepared or offered pursuant to this section shall minimize fragmentation of the most ecologically significant old growth forest stands. "Old growth forest stands" are defined as those stands meeting the criteria according to Forest Service Research Publication Numbered PNW-447. In those instances where the Forest Service, after consultation with the advisory boards established pursuant to subsection (c) of this section, determines that the definition in Forest Service Research Publication Numbered PNW-447 is not fully applicable in national forests known to contain northern spotted owls, the Forest Service shall

use old-growth definitions contained in its Pacific Northwest Regional Guide.

(2) To the extent that fragmentation of ecologically significant old growth forest stands is necessary to meet the timber sale levels directed by subsection (a)(1) of this section, the Forest Service shall minimize such fragmentation in the ecologically significant old growth forest stands on a national forest-by-national forest basis based on the Forest Service's discretion in determining the ecologically significant stands after considering input from the advisory boards created pursuant to subsection (c) of this section. The habitat of nesting pairs of spotted owls which are not in the Spotted Owl Habitat Areas (SOHAs) described in subsection (b)(3) of this section shall be considered an important factor in the identification of ecologically significant old growth forest stands.

(3) No timber sales offered pursuant to this section from the thirteen national forests in Oregon and Washington known to contain northern spotted owls may occur within SOHAs identified pursuant to the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 as adjusted by this subsection:

(A) For the Olympic Peninsula Province, which includes the Olympic National Forest, SOHA size is to be 3,200 acres;

(B) For the Washington Cascades Province, which includes the Mt. Baker-Snoqualmie, Okanogan, Wenatchee, and

Gifford-Pinchot National Forests, SOHA size is to be 2,600 acres;

(C) For the Oregon Cascades Province, which includes the Mt. Hood, Willamette, Rogue River, Deschutes, Winema, and Umpqua National Forests, SOHA size is to be 1,875 acres;

(D) For the Oregon Coast Range Province, which includes the Siuslaw National Forest, SOHA size is to be 2,500 acres; and

(E) For the Klamath Mountain Province, which includes the Siskiyou National Forest, SOHA size is to be 1,250 acres.

(F) All other standards and guidelines contained in the Chief's Record of Decision are adopted.

(4) In planning for the preparation and offer of timber sales authorized in subsection (a)(1) of this section, the Forest Service, to the extent possible in areas proximate to SOHA sites identified in subsection (b)(3) of this section, should exercise discretion in selecting sites and/or silvicultural prescriptions in order to retain spotted owl habitat characteristics in such areas. The Forest Service should consider the relative location and quality of such areas contiguous to the SOHAs and should give higher priority to preparing and offering sales in areas of lower quality and less important location than to areas of greater quality and more important location relative to the SOHAs.

(5) No timber sales offered pursuant to this section on Bureau of Land Management lands in western Oregon known to contain northern spotted owls shall occur within the 110 areas

identified in the December 22, 1987 agreement, except sales identified in said agreement, between the Bureau of Land Management and the Oregon Department of Fish and Wildlife. Not later than thirty days after enactment of this Act, the Bureau of Land Management, after consulting with the Oregon Department of Fish and Wildlife and the United States Fish and Wildlife Service to identify high priority spotted owl area sites, shall select an additional twelve spotted owl habitat areas. No timber sales may be offered in the areas identified pursuant to this subsection during fiscal year 1990.

(6)(A) Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc., et al. v. F. Dale Robertson, Civil No.

89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

(B) The Forest Service is directed to review and revise as appropriate the decision adopted in the December 1988 Record of Decision referenced in subsection (b)(6)(A) of this section and shall consider any new information gathered subsequent to the issuance of the Record of Decision, including the interagency guidelines for conservation of northern spotted owls developed by the Interagency Scientific Committee to address conservation of the northern spotted owl. This review, and any resulting changes to the December 1988 decision determined to be necessary by the Forest Service are to be completed and in effect not later than September 30, 1990.

(c)(1) The Secretaries of Agriculture and the Interior shall name advisory boards on a national forest-by-national forest and Bureau of Land Management district-by-district basis which shall be comprised of not more than seven individuals who, in the appropriate Secretary's judgment, represent a diversity of views. In the process of selecting individuals to serve on the advisory boards, the Secretaries shall make every effort to recognize the diversity of views and perspectives and allow parties which represent a cross-section of those views to participate in making recommendations in the selection of board members, provided, that every effort will be made to ensure the advisory boards are comprised of an

equal number of representatives of environmental and business concerns. The advisory boards shall be named not later than thirty days after enactment of this Act. The advisory boards shall provide recommendations to the Forest Service and the Bureau of Land Management in reviewing prospective timber sales which shall meet the timber sale levels directed by this section prior to their offer. The advisory boards shall present their advice within fifteen or forty-five days after receipt of the necessary review documents. The fifteen-day period applies to single sales and the forty-five-day period applies to multiple sales. The members of the advisory boards authorized by this section shall serve without compensation or reimbursement of expenses. The Forest Service and the Bureau of Land Management are authorized to use available funds for the services of professional, independent facilitators to assist in the work of the advisory boards.

(2) The Forest Service and Bureau of Land Management shall consider the recommendations of the advisory boards once such boards are established pursuant to this section, including any suggested modifications of individual sales. The Forest Service and Bureau of Land Management shall also consider recommendations made by the United States Fish and Wildlife Service on those timber sales conferred upon under section 7(a)(4) or, if the spotted owl is listed as a threatened or endangered species, consult under section 7(a)(2) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1536(a)(2) and (a)(4)) prior to the offer of any subsequent timber sale

in fiscal year 1990. These recommendations shall be considered regardless of whether the agreement provided in subsection (f)(1) of this section has been reached, entered into, and accepted by the relevant court. Adoption or rejection of such recommended modifications shall not require preparation of additional environmental documents, notwithstanding any other provision of law.

(d) Notwithstanding any other provision of law, there shall be not more than one level of administrative appeal of any decision by the Forest Service or the Bureau of Land Management to undertake any activity directed by this section for timber sales to be prepared, advertised, offered, and awarded during fiscal year 1990 from the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls. If an administrative stay is granted in any such appeal the Regional Forester or the Interior Board of Land Appeals shall issue a final decision on the merits within forty-five days of the date of issuance of such stay. Notwithstanding any other provision of law, any party seeking to challenge a decision made after the date of enactment of this Act to prepare, advertise, offer, or award a timber sale in fiscal year 1990 from the thirteen national forests and Bureau of Land Management lands in western Oregon known to contain northern spotted owls need not exhaust their administrative remedies prior to filing suit. Nothing in this subsection shall alter the administrative appeal requirements of the Forest Service or Bureau of Land Management.

(e) Nothing in this section shall affect interagency cooperation among the Forest Service, the Bureau of Land Management, and the United States Fish and Wildlife Service under sections 7(a)(2) and 7(a)(4) of the Endangered Species Act and its regulations.

(f)(1) Not later than two days after enactment of this Act, the Forest Service shall submit to plaintiffs in the captioned case Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160, a list of sales which had been prepared for offer in fiscal year 1989 and which contain at least 40 acres of suitable spotted owl habitat. Not later than fourteen days after receipt of such list, plaintiffs to the suit referenced in this subsection may enter into an agreement with the Forest Service releasing for sale not less than one billion one hundred million board feet of net merchantable timber. Such sales must be available for advertisement not later than fourteen days after the agreement required by this subsection is reached. Such timber sales selected shall not be subject to further judicial review by any court of the United States.

(2) If the agreement specified in subsection (f)(1) of this section is reached, then those timber sales described in the list submitted to plaintiffs pursuant to subsection (f)(1) of this section but not contained in the agreement authorized by subsection (f)(1) of this section shall not be offered for sale in fiscal year 1990.

(3) If the agreement authorized under subsection (f)(1) of this section is not implemented within the timeframes prescribed in subsection (f)(1) of this section, one billion one hundred

million board feet of net merchantable timber from such sales submitted to plaintiffs pursuant to subsection (f)(1) of this section shall be selected and modified as appropriate by the Forest Service in accordance with the provisions of this section. Selected sales shall be prepared, advertised, offered, awarded and operated notwithstanding any provision of law that is a basis for any stay, injunction or order issued in the proceeding identified in subsection (f)(1) of this section: *Provided*, That nothing in this subsection shall affect rights available under the Contract Disputes Act (41 U.S.C. 601 et seq.).

(4) The Forest Service shall, for each respective timber sale, lift its own stay or apply to the appropriate court for the lifting of the restraining order or injunction whose basis has been withdrawn by this section.

(5) Timber sales selection pursuant to subsections (f)(1) or (f)(3) of this section shall be based on the following criteria: (1) proportional distribution between Oregon and Washington national forests known to contain northern spotted owls based on the average sale volumes for fiscal years 1986 through 1988; (2) proportional distribution to the extent possible among the thirteen national forests known to contain northern spotted owls in Oregon and Washington based on the average sale volumes for fiscal years 1986 through 1988; and (3) to the extent possible, selection of sales outside the habitat of nesting pairs of spotted owls which are not in the Spotted Owl Habitat Areas described in subsection (b)(3) of this section.

(g)(1) No restraining order or preliminary injunction shall be issued by any court of the

United States with respect to any decision to prepare, advertise, offer, award, or operate a timber sale or timber sales in fiscal year 1990 from the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls. The provisions of section 705 of title 5, United States Code, shall not apply to any challenge to such a timber sale: *Provided*, That the courts shall have authority to enjoin permanently, order modification of, or void an individual sale if it has been determined by a trial on the merits that the decision to prepare, advertise, offer, award, or operate such sale was arbitrary, capricious or otherwise not in accordance with law: *Provided further*, That any challenge to a timber sale must be filed in Federal District Court within fifteen days of the date of initial advertisement of the challenged timber sale: *Provided further*, That for forty-five days after the date of filing of a challenge to a timber sale the affected agency shall take no action to award a challenged timber sale. Civil actions filed under this section shall be assigned for hearing at the earliest possible date and shall take precedence over all other matters pending on the docket of the court at that time except for criminal cases: *Provided further*, That the court shall render its final decision relative to any challenge within forty-five days from the date such challenge is brought, unless the court determines that a longer period of time is required to satisfy the requirements of the United States Constitution.

(2) Notwithstanding any other provision of law, the court may set rules governing the pro-

cedures of any such proceeding which set page limits on briefs and time limits on filing briefs and motions and other actions which are shorter than the limits specified in the Federal rules of civil or appellate procedure.

(3) In order to reach a decision within forty-five days, the Federal District Court may assign all or part of any such case or cases to one or more Special Masters, for prompt review and recommendations to the court.

(h) The Forest Service, the Bureau of Land Management, and the United States Fish and Wildlife Service shall submit reports updating their findings and progress as determined by the process recognized under subsection (e) of this section on a monthly basis to the President of the Senate and the Speaker of the House of Representatives for appropriate referral. Such reports shall also include information on the extent to which recommendations of the advisory boards established pursuant to subsection (c) of this section were integrated into timber sale decisions as well as reasons for modifying or not adopting recommendations made by the advisory boards. Such reports shall be submitted as directed beginning on December 1, 1989, and ending on September 30, 1990.

(i) Except for provisions of subsection (a)(1) of this section, the provisions of this section apply solely to the thirteen national forests in Oregon and Washington and Bureau of Land Management districts in western Oregon known to contain northern spotted owls. Nothing contained in this section shall be construed to require the Forest Service or Bureau of Land Man-

agement to develop similar policies on any other forest or district in Oregon or Washington.

(j) The advisory boards established under this section shall not be subject to the Federal Advisory Committee Act (86 Stat. 770).

(k) Timber sales offered to meet the requirements of subsection (a) of this section shall be subject to the terms and conditions of this section for the duration of those sale contracts. All other provisions of this section shall remain in effect until September 30, 1990.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

BRIEF OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, ET AL. IN SUPPORT OF PETITIONERS

MARK C. RUTZICK*
TIMOTHY J. SERCOMBE
Preston Thorgrimson Shidler Gates & Ellis
111 S.W. Fifth, Suite 3200
Portland, Oregon 97204
(503) 228-3200
Counsel for Northwest Forest Resource Council, et al.

* *Counsel of Record*

QUESTION PRESENTED

Whether section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 318, 103 Stat. 745 (1989), which mandates timber sales from particular federal lands, establishes interim guidelines for these sales, and establishes an exclusive judicial remedy for contesting the lawfulness of the mandated timber sales:

(1) Moots portions of respondents' claims in pending federal district court actions which seek declaratory and injunctive relief on planned timber sales; and,

(2) Violates the constitutional principle of separation of powers as applied to the adjudication of these claims.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, respondents Pilchuck Audubon Society, Washington Environmental Council, Washington Native Plant Society, Portland Audubon Society, Lane County Audubon Society, Oregon Natural Resources Council, and Siuslaw Task Force were plaintiffs in the district court (W.D. Wash.) and appellants in the court of appeals. National Audubon Society was a plaintiff in the district court (W.D. Wash.) and was not a party to the appeal. Respondents Washington Contract Loggers Association and William Pickell were plaintiffs in the district court (W.D. Wash.) and appellees in the court of appeals.

Respondents Portland Audubon Society, Headwaters, Lane County Audubon Society, Oregon Natural Resources Council, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Salem Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council were plaintiffs in the district court (D. Or.) and appellants in the court of appeals.

Respondents Northwest Forest Resource Council, Huffman & Wright Logging Co., Freres Lumber Co., Inc., Lone Rock Timber Co., Inc., Scott Timber Co., Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Inc., Douglas County Forest Products Company, Medford Corporation, Rogge Forest Products, Inc., Association of O & C Counties and Benton County were defendants-intervenors in the district court (D. Or.) and appellees in the court of appeals.

None of the parties has any parent, subsidiary or affiliated corporation except Lone Rock Timber Co., Inc., which is an affiliate of Sun Studs, Inc., and Scott Timber Co., which is an affiliate of Roseburg Forest Products Co.

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Forest Service, United States Dep't of Agriculture, *Production, Prices, Employment, and Trade in Northwest Forest Industries, Second Quarter 1990* (1990) 3, 4

Forest Service, United States Dep't of Agriculture, *The Forest Service Program for Forest and Rangeland Resources: A Long-Term Strategic Plan* (1990) 3

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In the Supreme Court of the United States

OCTOBER TERM, 1990

NO. 90-1596

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

BRIEF OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, ET AL. IN SUPPORT OF PETITIONERS

Respondents Northwest Forest Resource Council, Huffman & Wright Logging Co., Freres Lumber Co., Inc., Lone Rock Timber Co., Inc., Scott Timber Co., Clear Lumber Manufacturing Corp., Yoncalla Timber Products Inc., Cornett Lumber Company, Inc., Douglas County Forest Products Company, Medford Corporation, Rogge Forest Products, Inc., Washington Contract Loggers Association and William Pickell (hereafter collectively referred to as "NFRC"), defendants-intervenors-appellees below, submit this brief in support of the Brief filed by the Solicitor

General on behalf of petitioners F. Dale Robertson and Manuel Lujan, Jr.

OPINIONS BELOW

The amended opinion of the court of appeals is reported as *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990). The opinion and order of the district court in *Seattle Audubon Soc'y v. Robertson*, No. 89-160WD (W.D. Wash.), is unreported and is set out in Appendices C and D to the Petition for a Writ of Certiorari at 20a-28a and 29a-34a. The opinion of the district court in *Portland Audubon Soc'y v. Lujan*, No. 87-1160-FR (D. Or.), is unreported and is set out in Appendix E to the Petition for a Writ of Certiorari, 35a-42a.

JURISDICTION

Jurisdiction of the Court exists under 28 U.S.C. § 1254(1) (1991).

STATUTORY PROVISIONS INVOLVED

Section 318 of the Department of Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 103 Stat. 745 (1989) (hereafter "section 318"), is reproduced in its entirety in Appendix F to the Petition for a Writ of Certiorari, 43a-55a.

STATEMENT OF THE CASE

Respondent NFRC adopts the Statement of the Case set forth in petitioners' Brief.

Respondent NFRC supplements the Statement of the Case as follows:

A. Background to the proceedings below.

1. The timber economy of the Pacific Northwest.

In 1897 Congress authorized the establishment of national forests "to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. § 475. For nearly a century these regions have been a primary source of timber supply for the country.

The national forests of the Pacific Northwest supply about half of the timber sold by the Forest Service.[1] Until this litigation intervened, the 23 national forests in Washington, Oregon and northern California supplied approximately five billion board feet[2] of timber each year in the 1980s.[3]

In western Oregon the Department of Interior, Bureau of Land Management ("BLM") operates a separate timber sale program under the Oregon and California Lands Act

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[1] Forest Service, United States Dep't of Agriculture, *The Forest Service Program for Forest and Rangeland Resources: A Long-Term Strategic Plan*, 6-16 (1990).

[2] A board foot is a one foot by one foot by one inch volume of wood.

[3] Forest Service, United States Dep't of Agriculture, *Production, Prices, Employment, and Trade in Northwest Forest Industries, Second Quarter 1990*, Table 15 (1990) ("*Production, Prices*").

("OCLA"), 43 U.S.C. §§ 1181, *et seq.* This sale program contributes an additional one billion board feet of timber each year.[4]

Forest Service and BLM timber sales generate substantial revenues for the federal treasury. Forest Service 1990 timber sales for Oregon and Washington alone generated over $400 million in proceeds.[5]

The forest products industry in Washington and Oregon employed over 133,000 workers in 1990.[6] Much of this employment is dependent upon federal timber sales, which provide one-third of timber harvested in the Pacific Northwest.[7] A large component of the forest products industry in the region depends largely or completely on purchases of federal timber to operate their mills. Many of these federally-dependent mills are small, independent, family-owned businesses which have provided the main source of employment in their communities for decades.[8]

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[4] *Id.*, Table 15.

[5] Forest Service, United States Dep't of Agriculture, *Timber Sale Program Information Reporting System, Regional Summary, Fiscal Year 1989*, Appendix B at 3 (1990).

[6] *Id.*, Table 20.

[7] *Production, Prices, supra*, Table 74.

[8] Congress recognized the reliance of small mills on federal timber supply by establishing a "small business set-aside" program administered by the Small Business Administration. This program guarantees that certain proportions of federal timber may be (continued...)

Thirteen of the most productive national forests in Washington and Oregon are located west of the Cascade Mountains and are forested with old-growth and second-growth Douglas fir trees. These forests, and the woodlands in the six administrative districts of the BLM in western Oregon, provide habitat for northern spotted owls.

Concern has developed over the past fifteen years about the sufficiency of this habitat to support a viable population of northern spotted owls. In June, 1990, the United States Fish and Wildlife Service listed the northern spotted owl as a threatened species under the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.* 55 Fed. Reg. 26,114 (1990).

Beginning in the mid-1970s and continuing to the present, biologists from government agencies, universities and private groups developed and refined guidelines for managing spotted owl habitat. These standards have been refined as more information about the bird became known.

Unfortunately, no consensus about the content of these guidelines evolved among government officials, timber industry representatives and environmentalists. The main issues remaining in dispute are the total amount of land

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8 (...continued)
purchased by small businesses, thus assuring a steady supply of timber for these small companies. *See Duke City Lumber Co. v. Butz*, 382 F. Supp. 362 (D.D.C. 1974), *aff'd*, 539 F.2d 220 (D.C. Cir. 1976), *cert. denied sub nom., Duke City Lumber Co. v. Knebel*, 429 U.S. 1039 (1977).

needed for spotted owl habitat and the necessary parcel size and distribution of lands reserved for this purpose.

2. *Forest Service plans for spotted owl protection.*

The National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600, *et seq.*, directs the Forest Service to promulgate land and resource management plans (forest plans) for each unit of the National Forest System. The statute requires that these plans provide for multiple uses of the national forests and coordinate outdoor recreation, range, timber, watershed, wildlife and fish and wilderness uses. 16 U.S.C. § 1604(e)(1). In the Pacific Northwest, the development of these plans has been delayed by controversy and litigation.

Each region of the Forest Service has developed a regional guide to address regional forest planning issues and provide direction on the content of individual forest plans. *See* 36 C.F.R. § 219.8. The regional guides may also function as forest plans prior to the development and approval of individual forest plans.

In May, 1984, the Forest Service Chief approved the Pacific Northwest Regional Guide and accompanying Final Environmental Impact Statement. The Guide included planning standards for northern spotted owl habitat. The approval, however, was reversed following an administrative appeal. The agency then began preparation of a supplement

to address spotted owl habitat concerns. SAS Ex. Rec. 1, p. 9.[9]

A Supplement to the Environmental Impact Statement for the Pacific Northwest Regional Guide was prepared during 1985 to 1988. A draft Supplement, issued in 1986, analyzed 12 alternatives in detail, ranging from designating no spotted owl habitat areas ("SOHAs") to designating all remaining spotted owl habitat as protected. The Final Supplement, published in July, 1988, narrowed these alternatives to seven. *Id.* at 10.

On December 8, 1988, Petitioner Robertson amended the Pacific Northwest Regional Guide to generally reflect the spotted owl habitat guidelines outlined in Alternative F of the Final Supplement. These standards were applied to the 13 Washington and Oregon national forests with spotted owl habitat. *Id.* at 10; Ex. A.

The amended Regional Guide required the preservation of at least 300 acres of habitat immediately around each spotted owl nest site. From 1,000 to 3,000 total acres, varying by geographic area, were to be preserved near each nest site.

The amended Regional Guide contemplates the preservation of up to 858 spotted owl habitat areas on those

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[9] "SAS Ex. Rec." as used herein refers to the Appellants' Excerpts of Record in the appeal of *Seattle Audubon Society v. Robertson* to the court of appeals. "PAS Ex. Rec." refers to Appellants' Excerpts of Record in the *Portland Audubon Society v. Lujan* appeal.

portions of these national forests which are suitable for timber production and 272 habitat areas in wilderness areas. It contains additional standards on the clustering of SOHAs and the location of habitat areas and sets out a research and development program for information on the northern spotted owl.

Petitioner Robertson directed that the amended Regional Guide would provide interim forest management guidelines pending completion of the forest plans still in preparation.

The adoption of this spotted owl protection plan occurred through a Record of Decision dated December 8, 1988. SAS Ex. Rec. 1, Ex. A. This decision was challenged as violating various federal laws in the *Seattle Audubon Soc'y v. Robertson* case below.

3. Bureau of Land Management spotted owl protection.

Less detailed guidelines governed the management of forests in the six western Oregon districts of the BLM. Between 1979 and 1983, the BLM adopted Timber Management Plans for each of these districts. The Timber Management Plans were based on an environmental impact statement for each district. These Timber Management Plans contained guidelines for wildlife protection and timber management. PAS Ex. Rec. 9.

On February 3, 1987, the BLM Oregon State Director issued a Spotted Owl Environmental Assessment. This document reviewed new information concerning the habitat of the northern spotted owl to determine if a supplement was required to the recently completed environmental impact statements. PAS Ex. Rec. 11.

Based on this analysis, and because new resource management plans were then scheduled to be completed by 1990,[10] the BLM Oregon State Director issued an April 10, 1987 Decision Notice declining to supplement the environmental impact statements for the western Oregon districts. PAS Ex. Rec. 11.

The timber sales authorized by the BLM Timber Management Plans and a March, 1983 Forest Resource Policy Statement were claimed to violate federal law in the *Portland Audubon Soc'y v. Lujan* case below. PAS Ex. Rec. 15-16.

B. Initiation of the proceedings below.

1. Seattle Audubon Society v. Robertson.

On February 8, 1989, respondents Seattle Audubon Society, *et al.*, filed an action against petitioner Robertson as Chief of the United States Forest Service. The complaint sought declaratory and injunctive relief concerning Petitioner Robertson's December 8, 1988 decision to amend the Pacific Northwest Regional Guide and provide the spotted owl protection stated in Alternative F of the Final Supplement to the Environmental Impact Statement.

Three claims for relief were asserted. *See*, SAS Ex. Rec. 1, pp. 19-20. The first claim was that the administrative action "does not assure that a viable population of northern spotted owls will be maintained in the Pacific Northwest, in

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[10] The new plans are now expected to be completed in 1992.

violation of the National Forest Management Act ("NFMA"), 16 U.S.C. § 1604(g)(3)(B) . . . ." That statute sets out seven criteria for the content of forest plans. The criterion claimed to be violated requires these plans to "provide for diversity of plant and animal communities based on the suitability and capability of the specified land area in order to meet overall multiple-use objectives . . . ."

The second claim for relief alleged that the planned actions would violate the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§ 703, *et seq.* That statute makes criminal certain takings, killings, and other conduct related to protected migratory birds, unless permitted by action of the Secretary of the Interior.

The final claim asserted that the Final Supplement to the Environmental Impact Statement violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*, because its environmental analysis was faulty. The necessary content of environmental impact statements is governed by 42 U.S.C. § 4332(2)(C).

Respondents[11] sought injunctive relief enjoining the award of any timber sale contract in the 13 national forests at issue which would log more than 40 acres of spotted owl habitat.

In the spring of 1989, the district court granted preliminary relief to respondents and enjoined 163 planned timber

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[11] When using the term "respondents" in this brief, respondent NFRC refers to the plaintiff environmental groups in the cases below.

sales in Washington and Oregon. These sales involved sites containing more than 40 acres of old-growth timber.

2. ***Portland Audubon Society v. Lujan.***

Similar litigation had been filed earlier in Portland. In October, 1987, respondents sued petitioner Lujan's predecessor, as Secretary of the Interior, in the United States District Court for the District of Oregon. The complaint sought declaratory and injunctive relief, seeking to enjoin 15 planned timber sales and any future sales within 2.1 miles of a known spotted owl habitat.

Four claims were asserted to justify this relief. *See*, PAS Ex. Rec. 15-16. Respondents first contended that petitioner Lujan's plans to continue timber harvesting violated NEPA, *supra*, because of the failure to supplement previously issued environmental impact statements.

Respondents next claimed that petitioner Lujan's 1983 Forest Resources Policy Statement, which sets timber management standards for BLM lands subject to the OCLA, 43 U.S.C. §§ 1181, *et seq.*, violated section 1 of that act, 43 U.S.C. § 1181a. That legislation requires the Department of Interior to manage federal lands, largely reacquired from the Oregon and California Railroad:

> . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal *[sic]* of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the eco-

> nomic stability of local communities and industries, and providing recreational facilities *[sic]* . . . .

43 U.S.C. § 1181a.

The third claim asserted that the 1983 policy statement was inconsistent with multiple-use policies in the Federal Lands Policy and Management Act, 43 U.S.C. §§ 1701, *et seq.* That act sets general policies for the management of all federally-owned public lands. It requires consideration of a variety of goals in making federal land management decisions. The Act states that it is subordinate to other more specific statutes on the administration of public lands. *See* 43 U.S.C. § 1701(b).

Finally, respondents charged that the BLM timber harvesting program violated the MBTA, *supra*, because such activities would kill spotted owls. As noted earlier, that statute proscribes certain conduct affecting migratory birds unless allowed by a permit from the Secretary of the Interior.[12]

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[12] Respondents' NEPA claim was later mooted by the enactment of section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1988, Pub. L. No. 100-102, 101 Stat. 1329 (1987). The district court initially dismissed all of respondents' claims as mooted by this statute. This action was reversed by the court of appeals. *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, ___ U.S. ___, 109 S. Ct. 3229 (1989). On remand, the district court again dismissed the claims. *Portland Audubon Soc'y v. Lujan*, 712 F. Supp. 1456 (D. Or. 1989). In September, 1989, the court of appeals affirmed the dismissal of the (continued...)

Preliminary relief was obtained in these cases. The injunction against Forest Service logging during 1989 in *Seattle Audubon Society*, and the injunctions limiting BLM timber sales by the court of appeals in *Portland Audubon Society*, shut down a significant part of the Northwest timber industry. Fears of widespread unemployment and business losses, coupled with concerns for the preservation of the northern spotted owl, spurred Congress in 1989 to adopt temporary legislation on logging and spotted owl habitat preservation on federal forest lands in Washington and Oregon.

C. Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990.

Congress adopted section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 103 Stat. 745 (1989), in order to "balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted owl and significant old growth forest stands." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 87 (1989). To accomplish these ends, the legislation "sets terms and conditions applicable only for fiscal year 1990 for making timber sales on Federal lands in Oregon and Washington, for managing habitat of northern spotted owls, and for

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12 (...continued)
NEPA claim, but reversed the dismissal of the other claims and remanded the case for further proceedings. *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1470 (1990).

minimizing fragmentation of significant old growth forest stands." *Id.* In particular, the statute directs the following:

1. Aggregate timber sales levels/logging some spotted owl habitat.

Section 318(a)(1), 103 Stat. 745, requires the Forest Service to offer 7,700,000,000 board feet of timber for sale from national forests in Oregon and Washington in the two-year period of fiscal years 1989-90. Of this amount, 5,800,000,000 board feet was required to be offered from the "thirteen national forests in Oregon and Washington known to contain northern spotted owls . . . ." The BLM was required to offer 1,900,000,000 board feet in timber sales from its western Oregon districts in the same two-year period.

2. Increased spotted owl habitat protection.

Various parts of the legislation prescribe how logging activity will occur and what protection is to be afforded Spotted Owl Habitat Areas. These include:

a. Minimizing fragmentation of old growth stands.

Sections 318(b)(1) and (b)(2), 745 Stat. 745-46, require timber sales from the national forests known to contain northern spotted owls to "minimize fragmentation of the most ecologically significant old growth forest stands." To the extent fragmentation is required to meet the target sales level, areas with habitat for nesting pairs of spotted owls should be maintained, if not already included in a SOHA.

b. Expanded definition of spotted owl habitat areas.

Section 318(b)(3), 103 Stat. 746, expands the acreage of protected spotted owl habitats beyond that prescribed in the 1988 amended Regional Guide. The following chart shows the regional guide acreage requirements, the new acreage required by section 318(b)(3), the number of SOHAs in each area, and the additional SOHA acreage mandated by section 318(b)(3):[13]

Area	*Regional Guide Habitat (acres)*	*Section 318 Habitat (acres)*	*Affected SOHAs*	*Additional Acres Mandated by § 318(b)(3)*
Olympic Peninsula	3,000	3,200	34	6,800
Washington Cascades	2,200	2,600	208	83,200
Oregon Coast Range	2,000	2,500	41	12,300
Oregon Cascades	1,500	1,875	478	179,250

[13] The data on Regional Guide habitat acreage and estimated spotted owl habitat areas is taken from the Forest Service, United States Dep't of Agriculture, *Amendment Number 1 to the Regional Guide for the Pacific Northwest Region, May, 1984*, Tables 1, 9 (Dec. 1988).

Klamath	1,000	1,250	97	24,250
TOTAL:				305,800

c. Other protection.

Under section 318(b)(3) all other standards and guidelines for protection of spotted owl habitat in the December 8, 1988 Record of Decision are preserved. The Forest Service is also required to give lower priority to logging areas proximate to a SOHA. Section 318(b)(4), 103 Stat. 746.

Section 318(b)(5), 103 Stat. 746-47, prohibits timber sales within the 110 spotted owl habitat areas already protected under an agreement between the BLM and the Oregon Department of Fish and Wildlife. It supplements this protection by prohibiting logging in an additional 12 spotted owl habitat areas to be selected by BLM and other agencies.

3. Limitations on remedies.

The legislation limits and defines the exclusive remedies available to determine issues arising under the measure. Section 318(b)(6)(A), 103 Stat. 747, states that, "The guidelines adopted by subsections (b)(3) and (b)(5) of this section [the spotted owl habitat requirements] shall not be subject to judicial review by any court of the United States."

Any judicial challenge to a timber sale must be filed in federal district court within 15 days of the initial adver-

tisement for bids on the sale. Section 318(g)(1), 103 Stat. 749-50. Should such litigation be filed, the agency must not take action to award the sale for 45 days. In exchange, preliminary relief by a court is proscribed by section 318(g)(1) which provides that:

> No restraining order or preliminary injunction shall be issued by any court of the United States with respect to any decision to prepare, advertise, offer, award, or operate a timber sale or timber sales in fiscal year 1990 from the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls.

Section 318(g)(1).[14]

The subsection expedites judicial review of the challenged timber sale, requiring a "final decision relative to any challenge within forty-five days from the date such challenge is brought, unless the court determines that a longer period

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[14] Permanent injunctive relief could be obtained. Section 318(g)(1) provides that:

> . . . the courts shall have authority to enjoin permanently, order modification of, or void an individual sale if it has been determined by a trial on the merits that the decision to prepare, advertise, offer, award, or operate such sale is arbitrary, capricious, or otherwise not in accordance with law.

of time is required to satisfy the requirements of the United States Constitution." Section 318(g)(1). The statute allows the court authority to set special procedures to govern these proceedings and to assign such cases to special masters. *Id.*

4. Relationship to other laws.

Subsection (b)(6)(A) states that the spotted owl habitat guidelines adopted in subsections (b)(3) and (b)(5) suffice to meet the requirements of the laws at issue in respondents' pending cases.

Section 318(b)(6)(A) first declares that Congress is not "passing on the legal and factual adequacy of the [agency decisions at issue in the pending *Seattle Audubon Society* and *Portland Audubon Society* litigation]." Congress next specifically:

> . . . determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls ***is adequate consideration for the purpose of meeting the statutory requirements that are the basis for*** [the pending *Seattle Audubon Society* and *Portland Audubon Society* cases].

Section 318(b)(6)(A) (emphasis supplied).

Simply put, Congress desired to not determine the "legal adequacy" of the ***existing agency programs*** challenged in the pending litigation. It ***did*** desire, however, to determine the legal adequacy of the ***new spotted owl habitat guidelines*** adopted in subsections (b)(3) and (b)(5). Those guidelines were deemed to be consistent with other environmental laws and standards and "not . . . subject to judicial review . . . ." Section 318(b)(6)(A).

This intent is reflected in the legislative history of the provision which was adopted in the House-Senate Conference on the FY 1990 Interior Appropriations Act. The Conference Report notes:

> Section (b)(6)(A) does not pass on the legal sufficiency of the existing Forest Service ROD or the BLM/ODFW agreement insofar as each addresses concerns about the northern spotted owl. However, inasmuch as subsections (b)(3) and (b)(5) establish interim SOHA standards for fiscal year 1990 which protect more habitat than currently protected by the Forest Service and BLM, subsection (b)(6)(A) removes for fiscal year 1990 the sufficiency or insufficiency of those standards as a reason for injunctive relief. . . . Subsection (b)(6)(A) should be read in combination with subsection (g) which establishes expedited procedures for challenging timber sales in court. Together, these two subsections preserve the opportunity for judicial

> review of individual timber sales on a single-sale basis.

H.R. Conf. Rep. No. 264, *supra*, at 88-89.

In sum, section 318 replaced the existing Forest Service and BLM spotted owl habitat protection programs (at issue in the pending litigation) with different, more expansive programs applicable only to 1990 timber sales. It precluded judicial review over the adequacy of these new programs and limited judicial review of the application of the programs to individual timber contract sales. Finally, section 318 mandated that the new habitat protection guidelines were consistent with the environmental laws at issue in the pending litigation.

D. Post-section 318 district court proceedings.

1. Seattle Audubon Society v. Robertson.

On the basis of section 318, petitioner Robertson requested the district court to vacate the preliminary injunction still restraining 163 planned timber sales in Oregon and Washington. Respondents contended that section 318(b)(6)(A) was unconstitutional because Congress dictated the outcome in the pending cases and improperly barred judicial review of the spotted owl habitat guidelines established by the law.

On November 6, 1989 Judge William L. Dwyer lifted the injunction, determining that section 318(b)(6)(A) was

constitutional.[15] While recognizing that the separation of powers doctrine may bar Congress from directing a particular decision in a pending case, Judge Dwyer found that:

> However, subsection (b)(6)(A) does not require a particular decision on the issues of this case. Instead, it provides that for fiscal year 1990 the new standards adopted by Congress in subsections (b)(3) and (b)(5) will apply, and will be adequate for that year. In other words, Congress has adopted the Forest Service's proposed guidelines, challenged by both sets of plaintiffs in these cases, as statutory law for a period of one year. Congress clearly has the power to do this. . . .
>
> Just as Congress may create a geographic exception to the environmental laws, it may also create a temporal exception. It has done that here. Subsections (b)(3) and (b)(5), adopting the standards which subsection (b)(6)(A) deems adequate, apply only to that year . . . .

Pet. Writ of Cert., 24a.

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[15] That order is set out in Appendix D to the Petition for a Writ of Certiorari, 29a-34a. The Memorandum Decision on the constitutional claim issued on November 14, 1989 and is attached to the Petition for a Writ of Certiorari as Appendix C, 20a-28a.

Judge Dwyer retained jurisdiction of the cases because they were only partially mooted by the enactment of section 318. He ruled:

> The final question is whether the court should dismiss these cases or retain jurisdiction. Congress . . . has plainly stated that it did not mean to decide these cases, or to suggest what their final outcome should be. . . . Section 318 alters the rules of the controversy for the next year, but it does not end the controversy. . . . The texts of the statutes and the conference report show that Congress expected these cases to go forward.
>
> Whether or not the ROD is amended as a result of the process mandated by section 318, its legality under the environmental laws will still have to be decided. In the meantime, section 318 permits judicial review of proposed timber sales in the affected areas on an expedited basis. § 318(g). Given the short timetable mandated by Congress, it is important that the parties be able to proceed by motion in these cases rather than having to start a new lawsuit.
>
> For these reasons the cases will not be dismissed and the court will retain jurisdiction. . . .

Pet. Writ of Cert., 27a-28a.

2. *Portland Audubon Society v. Lujan.*

The same issues were involved in the Portland litigation. On December 21, 1989, dge Helen Frye dismissed the case as moot. Her decision is reproduced in Appendix E to the Petition for a Writ of Certiorari, 35a-42a. On the issue of the constitutionality of section 318(b)(6)(A), the court adopted "the reasoning and result of the United States District Court for the Western District of Washington in *Seattle Audubon Society v. Robertson*, ..." Pet. Writ of Cert., 37a-38a.

E. The decision of the court of appeals.

Respondents appealed the decisions of both district courts and the cases were consolidated on appeal. The court of appeals reversed, holding that the first sentence of section 318(b)(6)(A) was an improper limitation of judicial power by Congress. *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990). The court relied upon *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), and *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), to conclude that:

> [T]he critical distinction, for purposes of deciding the limits to Congress' authority to affect pending litigation through statute, is between the actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case, without

> repealing or amending the law underlying the litigation, which is not permissible.

Seattle Audubon Soc'y, 914 F.2d at 1315.

The court reasoned that section 318 could have only one of these two effects:

> The issue before us, then, is whether section 318 is a permissible modification of the law underlying the two cases before us, as the district courts held, or an impermissible directive from Congress to the courts to decide the cases in a particular way.

Id. at 1316.

Framing the issue in this fashion, the court then reasoned that if section 318 did not expressly modify the laws forming the bases for respondents' claims, then, *a fortiori*, it must be an impermissible directive to the courts to decide the cases in a particular way:

> Section 318 does not, by its plain language, repeal or amend the environmental laws underlying this litigation, even though some subsections add additional requirements. The clear effect of subsection (b)(6)(A) is to direct that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5), then the government will have done what is re-

> quired under the environmental statutes involved in these cases. Thus, if the Secretary does follow subsections (b)(3) and (b)(5) by observing their limitations on owl habitat, then the Secretary will be deemed in fact to have met as well the requirements of several environmental statutes.
>
> In this way Congress, through section 318, seeks to perform functions reserved to the courts by Article III of the Constitution.

Id. at 1316 (footnote omitted).

The court found further support for its construction of section 318 as directed fact-finding, instead of a "temporary repeal of the environmental laws at issue in the underlying litigation," because it was adopted as part of an appropriations measure. Relying upon *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), the court determined that implied substantive changes to laws cannot be enacted as part of an appropriations measure, thus "precluding a saving interpretation of subsection (b)(6)(A)." *Seattle Audubon Soc'y, supra*, at 1317.[16]

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[16] As a result of the court of appeals decision holding section 318(b)(6)(A) unconstitutional, litigation continues on the lawfulness of 1990 timber sales. On December 18, 1990, the district court for the Western District of Washington enjoined the award of 12 timber sales which the Forest Service had prepared, advertised and competitively auctioned in September, 1990 under the authority of Section 318. On May 24, 1991, four other sales were enjoined. The sixteen sales collectively contain over 97,327,000 board feet of timber.

Finally, the court confessed that its interpretation of section 318 was at odds with its legislative history:

> Although the legislative history of section 318 disguises the act as changing legal standards, the statutory language itself does not do so. The first sentence of subsection (b)(6)(A) violates the separation of powers doctrine.

Id. at 1317.

SUMMARY OF ARGUMENT

A. The cases were mooted because section 318 required different agency conduct than the conduct challenged in the pending cases.

Congress can constitutionally affect the outcome of litigation in more ways than by changing the law underlying the case or withdrawing the jurisdiction of the court to consider the case. Where the litigation is about prospective conduct of an agency, Congress can mandate different conduct. If Congress does this, judicial inquiry into the lawfulness of the previously planned behavior is no longer justiciable. In these cases, the prospective agency conduct at issue was legitimized or changed by various parts of section 318. The cases were mooted to the extent conduct mandated by these provisions replaces the agency conduct in question.

B. The cases were mooted because section 318 adopted an exclusive and different remedy to contest the agency conduct at issue.

Section 318(g) provides the exclusive remedy for contesting individual 1990 timber sales from the Oregon and Washington federal forests containing northern spotted owls. Section 318(g) moots respondents' premature, collective claims regarding these sales.

C. The cases were mooted because section 318 made the laws underlying respondents' claims inapplicable to the agency conduct at issue.

The court of appeals misconstrued section 318(b)(6)(A). The clear intent of the provision is to categorize the ***legal*** relationship of the mandated spotted owl habitat guidelines to the environmental laws otherwise applicable. The reading of section 318(b)(6)(A) given by the court of appeals is at odds with its text and legislative history.

D. Section 318(b)(6)(A) does not violate separation of powers principles drawn from United States v. Klein.

Section 318(b)(6)(A) makes no factual judgment. The subsection does not mandate particular judicial fact-finding; nor does it compel any particular judicial judgment on the merits of the cases below. To the contrary, it expressly disclaims any such judgment. The application of section 318(b)(6)(A) to the cases *sub judice* is consistent with the teaching of *United States v. Klein*, *supra*.

ARGUMENT

A. The cases were mooted because section 318 required different agency conduct than the conduct challenged in the pending cases.

1. Introduction.

Pending litigation can be affected by a wide range of congressional enactments. But respondents and the court of appeals allow Congress a choice between only *two* legislative options: an express general repeal of the statutes providing the bases for relief in the litigation; or, withdrawal of the jurisdiction of the courts to issue judgment in the case. But the choices available to Congress are certainly greater in number than these.

Congress has power to act in at least three other ways. First, it could adopt statutes on the litigation process that may affect the justiciability of a cause or its manner of adjudication. For example, legislation can narrow standing or make absent parties indispensable to the adjudication. Congress may also condition or limit the remedies available to a class of litigants. Applying this type of legislation to a pending case may markedly affect whether the requested relief is obtained.

Second, Congress can limit the applicability of general statutes to particular types of claims. Separate legislation may ordain particular policy, direct events or legitimize conduct notwithstanding otherwise applicable general law. Pending claims, brought within a newly-adopted statutory exception to the general law, may no longer be justiciable.

Finally, when litigation involves threatened prospective conduct of a government agency, Congress can compel different behavior by the agency. In so doing, claims about agency conduct no longer imminent are no longer justiciable.

The operation of section 318 produces all three of these effects. It changes the factual and legal context of the cases so that a justiciable question is no longer before the court with respect to the 1990 timber sales program. It ***moots*** portions of the relief requested by respondents, rather than directing the nature of this relief.

2 ***Mandated changes to agency conduct.***

The complaint in *Seattle Audubon Soc'y v. Robertson* sought injunctive and declaratory relief that operation of parts of the December 8, 1988 amended Regional Guide were inconsistent with three federal statutes. The particular agency conduct that was questioned involved:

(a) The decision to allow ***any*** timber harvesting of old-growth forests in parcel sizes of greater than 40 acres. Respondents contended all such habitat must be preserved for the northern spotted owl by operation of the cited federal statutes.

(b) The decision to require only 1,000 to 3,000 acres of preserved habitat around or near each spotted owl nesting site. Respondents believed larger areas were required.

(c) The decision to allow dispersion of these habitats. Respondents asserted that the preservation of large

> blocks of old growth forest, containing several SOHAs, was necessary.

Respondents prayed for a declaration that the planned conduct violated the NFMA, NEPA and the MBTA and for the court to:

> Order the Forest Service to comply with the requirements of NEPA, the NFMA and the MBTA, and until defendants do so, issue, as necessary, temporary restraining orders, preliminary and permanent injunctions restraining defendants from offering or awarding any contract for the sale and logging of timber from [listing of thirteen national forests] that will log more than forty (40) acres of suitable nesting or foraging habitat for northern spotted owls.

SAS Ex. Rec. 1, p. 21.

Various parts of section 318 compelled ***different*** conduct by the Forest Service during the 1990 fiscal year than intended under the amended Regional Guide. As noted earlier, the legislation adopted a temporary spotted owl habitat protection program which:

(a) Compelled substantial timber harvesting from forests "known to contain northern spotted owls . . . ." Section 318(a)(1).

(b) Required measures to minimize fragmentation of large stands of old-growth timber. Sections 318(b)(1) and 318(b)(2).

(c) Substantially increased SOHA size from the area mandated by the amended Regional Guide. Section 318(b)(3). As a result, over 300,000 additional acres were added to protected spotted owl habitat.

(d) Required limited protection of areas adjacent to SOHAs. Section 318(b)(4).

Thus, the statute substituted a different program for 1990 than the program countenanced under the amended Regional Guide.[17]

A similar dynamic occurred with respect to the *Portland Audubon Soc'y v. Lujan* litigation. There also, spotted owl protection decisions by the BLM were challenged as violating the same or similar federal laws. Declaratory and injunctive relief was sought, including an injunction on the offering of timber sales in old-growth forests. Section 318 compels the harvesting of timber from these areas and mandates the preservation of an additional 12 spotted owl habitat areas above the 110 areas reserved under the agency's adopted programs.

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[17] The Conference Report on the legislation notes that, "The managers have chosen to substitute adjusted interim standards for SOHAs for national forests in lieu of the spotted owl management Record of Decision (ROD) published in December, 1988." H.R. Conf. Rep. No. 264, *supra*, at 88.

The compelling of these substituted agency programs moots respondents' claims questioning the adequacy of earlier-planned programs for the same time period. Whether these substituted programs were lawful was not placed at issue in the complaints filed below. Any declaration or injunction about a different 1990 spotted owl protection program than required by section 318 would be pointless. Such relief would only be advisory. Article III to the Constitution bars the obtaining of purely advisory relief. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).[18]

This effect of section 318 does not depend upon the construction or constitutionality of section 318(b)(6)(A). Instead, it arises from those portions of the statute which define and mandate a temporary 1990 spotted owl protection program.

Finally, this effect of section 318 is limited. Section 318 does not moot legal issues about the adequacy of agency programs during the period beyond 1990.

For this reason, the court of appeals erred in reversing the district courts' dismissal of respondents' claims concerning the 1990 timber sales program as moot.

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[18] For cases where legislatively-mandated changes to agency programs were held to moot pending litigation about earlier-planned conduct *see Defenders of Wildlife v. Endangered Species Scientific Auth.*, 725 F.2d 726 (D.C. Cir. 1984); *Texas Comm. on Natural Resources v. Bergland*, 573 F.2d 201 (5th Cir. 1978).

B. The cases were mooted because section 318 adopted an exclusive and different remedy to contest the agency conduct at issue.

The second way that Congress mooted the claims in the pending cases through section 318 is by limiting the remedies available to contest the legal adequacy of the 1990 spotted owl protection program and its implementation through timber sales. To the extent that respondents challenged this 1990 program in the cases below, their claims are barred. To the extent their challenge was aimed at the implementation of this program, their claims were untimely and not in the form required by the statute.

The adopted 1990 spotted owl protection program is largely contained in subsections (b)(3) and (b)(5) of section 318. The last sentence of section 318(b)(6)(A) provides that:

> The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

This restriction precludes judicial inquiry into the legal adequacy or wisdom of the particular spotted owl habitat programs mandated by the statute.[19] It eliminates the

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[19] No party to this litigation has suggested that Congress lacks the power to limit judicial review in this manner. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672 (1986) ("Subject to constitutional constraints, Congress can, of course, make exceptions to the historic practice whereby courts review agency (continued...)

judicial review remedy that otherwise might exist under 5 U.S.C. §§ 702 and 706(2)(A).[20] To the extent respondents' claims in the proceedings below seek such a remedy, they are barred under section 318(b)(6)(A).[21]

The ***only*** remedy provided by section 318 is set out in subsection (g). Subsection (g) allows challenge to ***individual***

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[19] (...continued)
action. The presumption of judicial review, is, after all, a presumption . . . ."). Here, Congress' power to deprive the court of jurisdiction is strengthened by the doctrine of sovereign immunity since these actions are against the United States. Under this doctrine, "[t]he United States, a sovereign, is immune from suits save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538 (1980), *quoting United States v. Sherwood*, 312 U.S. 584, 586 (1941). Where Congress has consented to suit against the United States, "Congress retains power to withdraw the consent at any time." *Lynch v. United States*, 292 U.S. 571, 581 (1934). For this reason, "statutes either denying or withdrawing judicial remedies against the United States or with respect to claims against it are constitutional." *Heller v. United States*, 776 F.2d 92, 98 (3d Cir. 1985).

[20] The sole basis for obtaining judicial review asserted in the complaints filed below is under these provisions of the Administrative Procedures Act. *See*, SAS Ex. Rec. 1, pp. 19-20; PAS Ex. Rec. 15-16. 5 U.S.C. § 702 gives a person adversely affected or aggrieved by "agency action" the right to seek judicial review. 5 U.S.C. § 705 specifies the relief available pending review.

[21] This provision of the statute was ignored by the court of appeals. "We express no opinion on the validity of the second and final sentence of subsection (b)(6)(A)." *Seattle Audubon Soc'y v. Robertson*, *supra*, at 1317, n.4 (1990).

timber sales offered in 1990. Such a claim is limited to the issues of whether such a sale is consistent with the mandated spotted owl program or is otherwise in accordance with laws regulating the timber sale contract process. The statutory subsection requires that complaints about individual timber sales "be filed in Federal District Court within fifteen days of the date of initial advertisement of the challenged timber sale." Section 318(g)(1).

Thus, to the extent that respondents' complaints can fairly be read to include a challenge to the award of 1990 timber sales contracts, the claims are defective for two reasons. First, they seek no review over ***individual*** timber sales. Instead, they question a ***collective*** program. Second, the complaints were not filed within fifteen days after initial advertisement of these contracts.

There is little question that Congress can substitute, repeal, or enact remedies in a way that moots pending litigation concerning statutory duties or rights.[22] *See, e.g., Cort v. Ash*, 422 U.S. 66 (1975) (shareholder derivative suit mooted by intervening legislation providing for administrative remedy).

Here, section 318 relegates certain 1990 timber sale contract disputes to the exclusive judicial process described in subsection (g). Because portions of respondents' claims

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[22] This case involves no ***constitutional*** right or duty of any party to the litigation. The power of Congress to limit the remedial powers of the judiciary for constitutional claims may be subject to a different analysis than Congress' power to limit remedies concerning rights or duties of its own making.

seek greater remedies than provided in this law, and because they are not brought in the fashion mandated by the statute, respondents' claims for relief concerning these sales are moot.

For this second reason, the court of appeals erred in reversing the district courts' dismissal of these claims as moot.

C. The cases were mooted because section 318 made the laws underlying respondents' claims inapplicable to the agency conduct at issue.

The final aspect of mootness, and the only one adjudicated by the court of appeals, concerns whether section 318 excepted the adopted spotted owl protection program from the provisions of the environmental and planning statutes underlying respondents' claims in the complaints below. Congress' intent to create such an exception is clear from the text of the statute and its legislative history. Congress is not disabled from promulgating such an exception by choosing to place it within an appropriations measure.

There are three questions relevant to the analysis of the efficacy of section 318(b)(6)(A):

(1) Does Congress have the power to create exceptions to previously adopted general laws?

(2) Did Congress intend, in adopting section 318(b)(6)(A), to create exceptions to the dictates of the statutes underlying respondents' claims in the cases below?

(3) Should that intent not be given effect because of its form (a legislative determination of deemed compliance) or its placement in an appropriation measure?

All parties agree on the answer to the first question. It goes without question that Congress can amend or repeal previously adopted law.[23] It can do this either by directly amending or repealing the law or by making a subsequent law the exclusive policy in the subject area (implied repeal). Congress' power to do this is limited only by constitutional constraints on the manner of enacting legislation (constitutional requirements of bicameralism and presentment) or the content of legislation (*e.g.*, equal protection, bill of attainder).

There can be no dispute on the answer to the second question; the differences between the parties really lie in the third part of the analysis.

Section 318(b)(6)(A) provides in relevant part that:

> (6)(A) Without passing on the legal and factual adequacy of the Final Supple-

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[23] For cases holding that an amendment to legislation moots claims about the operation of the unamended law, *see*, *Lewis v. Continental Bank Corp.*, ___ U.S. ___, 110 S. Ct. 1249 (1990); *United States Dep't of Treasury v. Galioto*, 477 U.S. 556 (1986); *Hall v. Beals*, 396 U.S. 45 (1969); *Hines v. Davidowitz*, 312 U.S. 52 (1941). This mooting effect is even more pronounced when the litigation seeks only declaratory or injunctive relief, as is the case here. *See Bunker Ltd. Partnership v. United States*, 820 F.2d 308, 311 (9th Cir. 1987).

> ment to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide--Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls ***is adequate consideration for the purpose of meeting the statutory requirements that are the basis for*** [the pending *Seattle Audubon Society* and *Portland Audubon Society* cases].

Section 318(b)(6)(A) (emphasis supplied).

Congress' intent is plain. It is very clear that Congress intended to except the enacted spotted owl habitat program and its implementation from the operation of the NEPA, the MBTA, the NFMA, the OCLA, and the Federal Land Policy and Management Act, *i.e.*, the "statutory requirements that are the basis for" the cited litigation. What other meaning can there be to the language "adequate consideration for the purpose of meeting the . . . requirements" of these statutes?

This intent is displayed in the legislative history of the statute. The Conference Report, after declaring the intent to establish the "legal adequacy of . . . the SOHA framework established" in subsections (b)(3) and (b)(5), states:

> Section (b)(6)(A) does not pass on the legal sufficiency of the existing Forest Service ROD or the BLM/ODFW agreement insofar as each addresses concerns about the northern spotted owl. However, inasmuch as subsections (b)(3) and (b)(5) establish interim SOHA standards for fiscal year 1990 which protect more habitat than currently protected by the Forest Service and BLM, subsection (b)(6)(A) removes for fiscal year 1990 the sufficiency or insufficiency of those standards as a reason for injunctive relief.

H.R. Conf. Rep. No. 264, *supra*, at 89.

This legislation was enacted to respond to the consequences of litigation, to ameliorate the effects of injunctions stopping the supply of timber in the Pacific Northwest. Congress plainly intended to limit litigation over the compromise program it adopted. Without excepting the temporary program from argument over the applicability of general environmental and planning laws, the program would never be implemented.

The intent of Congress is plain from the text, the legislative history and the context of this legislation.

The final question is whether this congressional intent should not be given effect because of its form or because it was adopted as part of an appropriations measure. The latter issue merits quick disposition.

Relying upon *Tennessee Valley Auth. v. Hill*, *supra*, the court of appeals found that Congress could not enact an implied partial repeal of environmental statutes in an appropriations measure. *Seattle Audubon Soc'y v. Robertson*, *supra*, at 1317. This purported disability was critical in the court's determination that section 318(b)(6)(A) had no such effect.

What *Hill* and other precedent establish, however, is that while repeals by implication are ***disfavored*** in appropriations measures, they clearly are not ***prohibited***. The issue is one of congressional intent. An allowance or withdrawal of an appropriation is not sufficient ***by itself*** to repeal general substantive law.

Thus, the rule is stated in *United States v. Will*, 449 U.S. 200, 222 (1980):

> Nevertheless, when Congress desires to suspend or repeal a statute in force, "[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriations bill, or otherwise." *United States v. Dickerson*, 310 U.S. 554, 555, 60 S.Ct. 1034, 1035, 84 L.Ed. 1356 (1940). "The whole question depends upon the intention of Congress as expressed in

> the statutes." *United States v. Mitchell*, 109 U.S. 146, 150, 3 S.Ct. 151, 153, 27 L.Ed. 887 (1883).

The placement of section 318 in an appropriations measure is no bar to giving effect to the obvious congressional intent here.

Whether the form of the congressional action here was proper raises the first of two separation of powers concerns. Whether section 318(b)(6)(A) offends separation of powers principles depends upon: (1) whether Congress was exercising a power that is constitutionally committed to the judiciary; and, (2) whether the exercise of this power by Congress prevents the judiciary from exercising its constitutional functions or duties. The first concern is one about the ***type*** of action taken; the second concern goes to the action's ***effect***.

These are related but different concepts. An example of the first concern is *Bowsher v. Synar*, 478 U.S. 714 (1986). There, this Court held a statute unconstitutional because it improperly gave an agent of Congress executive functions to perform. An example of the second concern is *United States v. Klein*, *supra*, where the Court held that Congress acted improperly in prescribing an unconstitutional rule of decision in a pending case under threat of loss of judicial jurisdiction. As more fully discussed below, Congress directed no rule of decision in pending cases in adopting section 318(b)(6)(A). Instead, it is the first concern that is more relevant here.

Congress acted in a policy-making legislative manner in adopting the first sentence of section 318(b)(6)(A). Respondents contend that the form of the enactment, a determination that the spotted owl policies are consistent with the policies dictated by other statutes, is judicial in nature. For the reasons stated below, respondents are incorrect.

Whatever issues may exist, however, about the ***form*** of the enactment, its ***substance*** -- the creation of an exception to the operation of general environmental and planning laws -- is well within the province of the Legislative Branch. As this Court aptly observed in *Crowell v. Benson*, 285 U.S. 22, 53-54 (1932):

> In deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority . . . regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form, but to the substance of what is required.

Here, the form of the enactment is of little constitutional significance. This Court can and should avoid further separation of powers analysis by reading section 318(b)(6)(A) to mean what it does, legislating a programmatic exception to statutes previously enacted.[24]

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[24] *See Califano v. Yamasaki*, 442 U.S. 682, 693 (1979) (court should adopt construction of statute by which issue of constitutionality can be avoided).

If the form of the provision is significant, however, it does not offend constitutional principles about separation of powers. Congress can legislate conclusions about the meaning and effect of statutes. There is no constitutional text or principle that assigns this task exclusively to the judiciary. When Congress draws such conclusions, it only edits the work it previously has done. It does not adjudicate.

This is particularly true when, as here, Congress determines the effect of statutes which govern policymaking by administrative agencies, as opposed to statutes which create individual rights or duties. The statutes in question, the NEPA, the NFMA, the OCLA, and the Federal Land Policy and Management Act, control administrative agencies and executive branch officers and set standards for the creation of administrative policy. Congress acts as a policymaker and in an Article I manner when it preempts administrative policymaking, issues its own policies and determines that statutes guiding the formation of administrative agency policy are satisfied.[25]

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[25] The section 318(b)(6)(A) determination that these environmental and planning statutes are satisfied may reflect nothing more than the conclusion that these statutes do not apply ***to Congress***, to programs mandated by specific congressional enactments. The statutes in question apply to executive branch officers and administrative agencies. ***They do not apply to Congress***. *See* 42 U.S.C. § 4332(2) (application of NEPA to "all agencies of the federal government"); 43 U.S.C. § 1712 (land use planning of Secretaries of Agriculture and Interior regulated by Federal Land Policy and Management Act); 16 U.S.C. § 1604 (Secretary of Agriculture limited by standards of National Forest Management Act); 43 U.S.C. § 1181a

(continued...)

Any constitutional limitations on statutes which draw conclusions come, not from Article I, but from other parts of the Constitution. *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (regulation creating irrebuttable presumption found to violate Due Process Clause). No such constitutional infirmity is assigned here.

In sum, Congress is constitutionally empowered to amend, repeal, or create exceptions to legislation. In the enactment of section 318(b)(6)(A), Congress exercised this power to except the mandated spotted owl protection program from the operation of particular environmental and planning laws. Congress exercised this power in a legislative manner, consistent with its authority under Article I of the Constitution.

Because section 318(b)(6)(A) excepted the 1990 spotted owl habitat protection program from the laws which respondents allege to be violated, respondents' claims which seek redress for these actions were mooted. For this third reason, the court of appeals erred in reversing the district courts' dismissal of those claims as moot.

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25 (...continued)
(Department of Interior actions limited by OCLA), 16 U.S.C. § 707 (coverage of MBTA affects only "persons" and not governmental agencies or Congress). In many cases these statutes state that they do not control conduct authorized by specific law. *See* 42 U.S.C. § 4334 (NEPA not intended to affect agency compliance with specific environmental criteria or standards); 43 U.S.C. § 1701(b) (OCLA policies not in derogation of "the purposes for which public lands are administered under other provisions of law.")

D. Section 318(b)(6)(A) does not violate separation of powers principles drawn from United States v. Klein.

The second separation of powers concern is whether the implementation of section 318(b)(6)(A) prevents the judiciary from exercising its constitutional functions. Respondents claim, and the court of appeals held, that the statutory subsection violates this separation of powers principle by directing the outcome in the cases below.

Section 318(b)(6)(A) does no such thing. As argued above, it ***moots*** the 1990 claims in the cases below by substituting different agency action, limiting the scope of available remedies and modifying the applicable standards. But it does not ***direct judgment*** by the district courts on whether the 1987 and 1988 agency programs in question violated the environmental and planning laws raised in respondents' complaints.

Only when Congress leaves the applicable substantive and remedial law in place, allows the courts to retain jurisdiction, requires no different conduct by the defendant, and ***then*** directs the outcome of litigation does it invade the constitutionally assigned function of the courts. That was the vice of the legislative action in *United States v. Klein*, *supra*.

In *Klein*, Congress enacted a law requiring a court to make a conclusive factual finding on the effect of a presidential pardon, that the issuance of a pardon for acts of treason during the Civil War proved the commission of the acts of treason described in the pardon. More importantly, the legislation required the court of claims and this Court to deny any pending claims based on a presidential pardon

for want of jurisdiction. The legislation did not require the courts to refrain from acting on a case, but to act in a particular way -- to dismiss the case ***on its merits***.

Klein is different from the cases at bar in three significant ways. First, section 318(b)(6)(A) does not direct a decision ***on the merits*** of the claims asserted below. It expressly states that it has no effect on "the legal and factual adequacy" of the agency decisions challenged in the pending cases. The statute provides that:

> (6)(A) Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide--Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs . . . .

Section 318(b)(6)(A).

This intent is reflected in the statute's legislative history. As noted in the Conference Report:

> The legal adequacy of and prohibition against judicial review of the SOHA framework . . . should not be construed to moot

> future action after fiscal year 1990 in the *Seattle Audubon Society/Washington Contract Loggers Association v. Robertson* cases against the current Forest Service owl management ROD or any cases which may be filed against a revised ROD.
>
> . . . .
>
> . . . The legal adequacy of and prohibition against judicial review of the SOHA framework established in this section should not be construed to moot future action after fiscal year 1990 in the *Portland Audubon Society v. Lujan* case against current BLM owl management activities or any cases which may be filed against future BLM management decisions.
>
> . . . .
>
> Nothing in [section 318(b)(6)(A)] is intended to prejudge . . . any final decisions that may be reached by a Federal court in the *Seattle Audubon/Washington Contract Loggers Assoc. v. Robertson* cases and the *Portland Audubon v. Lujan* case . . . .

H.R. Conf. Rep. No. 264, *supra* at 88-89.

Thus, section 318(b)(6)(A) leaves intact the non-mooted claims in the litigation and directs no particular result in the adjudication of those claims. In the words of Judge Dwyer,

"Section 318 alters the rules of the controversy for next year, but it does not end the controversy." Memorandum Decision, Pet. Writ of Cert. 24a.

The second distinction is that section 318(b)(6)(A) involves no constitutional classification. In *Klein*, the legislative presumption determined the effect of a presidential pardon and thus infringed the constitutional power of the Executive. The power of Congress to determine the effect of its ***own*** actions is different from its power to determine the effect of actions of ***another*** branch of government.

Finally, Congress, in adopting section 318(b)(6)(A), took action pursuant to a specific enumerated power given to it by the Constitution. Article IV, section 3, clause 2 of the Constitution empowers Congress,

> [T]o dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States . . . .

In *United States v. Sioux Nation of Indians*, *supra*, this Court recognized that Congress' power to affect issues in pending or future litigation may be greater when it is acting pursuant to a specific enumerated power in the Constitution. There, the congressional power to pay debts granted in Article I, section 8, clause 1 was a significant factor in this Court's approval of legislation allowing re-litigation of a cause previously decided by the courts.

Thus, section 318(b)(6)(A) does not direct a decision by any court. It offends no principle of separation of powers.

The court of appeals erred in holding that the subsection was unconstitutional for this reason.

CONCLUSION

This Court has recently stated that, "[w]hen this Court is asked to invalidate a statutory provision that has been approved by both Houses of Congress and signed by the President, . . . it should do so for only the most compelling constitutional reasons." *Mistretta v. United States*, ___ U.S. ___, 109 S. Ct. 647, 661 (1989). There is no constitutional reason, much less a compelling one, to rule that any part of section 318 is unlawful.

The court of appeals erred in reversing the dismissal of respondents' 1990 timber sale claims as moot. These claims were mooted by section 318 in three different ways: by the change to the agency conduct at issue; by the limitations placed on the remedies available to contest the agency action; and, by the change in the applicability of the laws underlying respondents' claims. The legislation offended no principle of separation of powers either in the manner of its enactment or in its effect on pending cases.

The decision of the court of appeals in *Seattle Audubon Soc'y v. Robertson*, *supra*, should be reversed and remanded to the court of appeals for a determination of the second

issue on appeal raised by respondents in the *Portland Audubon Soc'y v. Lujan* case.

Dated this 26th day of August, 1991.

Respectfully submitted,

MARK C. RUTZICK*
TIMOTHY J. SERCOMBE
PRESTON THORGRIMSON
SHIDLER GATES & ELLIS
3200 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 228-3200

Counsel for Northwest Forest
Resource Council, et al.

Counsel of Record

No. 90-1596

SUPREME COURT, U.S.
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In the Supreme Court Of The United States

October Term, 1991

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, Petitioners

v.

SEATTLE AUDUBON SOCIETY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS THE ASSOCIATION OF O & C COUNTIES AND BENTON COUNTY IN SUPPORT OF PETITIONERS

*Phillip D. Chadsey
Kevin Q. Davis
Stoel Rives Boley Jones & Grey
900 SW Fifth Avenue, Suite 2300
Portland, OR 97204-1268
Telephone: (503) 224-3380
Telecopy: (503) 220-2480
**Counsel of Record*

Pursuant to Rules of the Supreme Court 24.2, respondent is satisfied with Petitioner's question presented, statement of parties to the proceeding, opinions below, jurisdiction and statutory provision involved.

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Legislative History:

H.R. Conf. Rep. No. 101-264, 101st Cong., 1st Sess. (1989) 9, 10

No. 90-1596

In The Supreme Court Of The United States

October Term, 1991

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, Petitioners

v.

SEATTLE AUDUBON SOCIETY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS THE ASSOCIATION OF O & C COUNTIES AND BENTON COUNTY IN SUPPORT OF PETITIONERS

Respondents the Association of O & C Counties and Benton County (collectively hereinafter the "O & C Counties"), defendants-intervenors-appellees below, respectfully join in and support the petitioners' challenge to the judgment of the United States Court of Appeals for the Ninth Circuit (the "Court of Appeals") in this case.

STATEMENT OF THE CASE

The O & C Counties adopt and join in the Statement of the Case set forth in the brief of petitioners F. Dale Robertson, Chief, United States Forest Service, the United States Forest Service, and Manuel Lujan, Jr., Secretary of the Interior.

The O & C Counties supplement the Statement of the Case set forth in petitioners' brief with the following information concerning the O & C Counties and their interest in this litigation:

The Association of O & C Counties consists of 18 Western Oregon counties, including Benton County, that have specific, statutorily established interests in certain federal lands affected by the spotted owl controversy. The interests arise under the Oregon & California Lands Act of 1937, 43 U.S.C. § 1181a, et seq. (1982) (the "O & C Act").

The O & C Act, like the appropriations statute at issue in this appeal, reflects Congress' sensitivity to the needs of rural communities that historically have played a vital role in supplying the nation's need for high-quality public timber. In the early part of this century, Congress attempted by various means to provide support for local governments in the sea of federal timber that is Western Oregon. *See Skoko v. Andrus*, 638 F.2d 1154, 1156 (9th Cir. 1979) (describing legislation enacted in 1916 and 1926); *Clackamas County, Ore. v. McKay*, 219 F.2d 479, 483 (D.C. Cir. 1954), *judgment vacated as moot*, 349 U.S. 909 (1955) (describing attempts to compensate local governments for the fact that federal lands had not passed into private ownership and therefore were not part of the

tax or industrial bases). Congressional efforts prior to 1937 to support western Oregon's local governments failed. In 1937, the O & C Act created a special category of federal lands located in the O & C Counties (the "O & C Lands") and provided that those lands are to be managed by the Bureau of Land Management ("BLM") apart from all other lands under the jurisdiction of either the BLM or the Forest Service. Congress succeeded with the O & C Act in creating an economic foundation for regional development.

Unlike the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. 1701, *et seq.* (1982), and other federal land management statutes that contain multiple use mandates, the O & C Act provides that the O & C Lands are to be managed primarily for the sustained yield production of timber so as to provide an economic foundation for local communities. 43 U.S.C. 1181a; *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1183-84 (9th Cir. 1990). In addition to guaranteeing a source of raw materials for the private sector economy, the O & C Act provides for direct payment of a portion of timber sale revenues to the county governments of the O & C Counties. Most of the BLM lands at issue in this appeal are O & C Lands from which the O & C Counties are entitled to 50 percent of timber sale revenues.

ARGUMENT SUMMARY

Modification or repeal of existing environmental statutes falls within Congress' plenary power to manage federal lands and to provide for the support

of timber-dependent communities. Section 318(b)(6)(A) of the Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 745 (1989) (the "1990 Appropriations Act"), can fairly be interpreted as a temporary, geographically limited repeal of the environmental laws that provided the basis for the environmental groups' claims in these consolidated cases. Such an interpretation is mandated because acts of Congress enjoy a presumption of constitutionality and must be construed, if possible, in a manner that renders them constitutionally valid. Applying this interpretation, this Court should reverse the Court of Appeals' invalidation of the 1990 Appropriations Act. Alternatively, this Court should reverse the Court of Appeals' holding because the limitation of federal court jurisdiction set forth in section 318 precludes any finding of fact or law with respect to the section 318 management guidelines.

ARGUMENT

I. INTRODUCTION

Congress responded to court-imposed timber sale injunctions and resultant dwindling timber supplies in the O & C Counties and elsewhere in the Pacific Northwest by including interim protective measures in the 1990 Appropriations Act. The purpose of the protective measures was to provide temporary relief for local economies dependant upon the timber industry. As a part of the interim relief, Congress, in section 318(b)(6)(A), provided as follows:

> Without passing on the legal and factual adequacy of . . . the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsection[] . . . (b)(5)[1] of this section on . . . Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for . . . the case *Portland Audubon Society et al. v. Manuel Lujan, Jr.*, Civil No. 87-1160-FR. The guidelines adopted by subsection[] . . . (b)(5) of this section shall not be subject to judicial review by any court of the United States.

Seattle Audubon Society and the other respondent environmental groups contend that this provision invades the province of authority reserved to the judicial branch of the government and is therefore unconstitutional.

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[1] Section 318(b)(5) of the 1990 Appropriations Act provides that

> [n]o timber sales offered pursuant to this section on Bureau of Land Management lands in western Oregon known to contain northern spotted owls shall occur within the 110 areas identified in the December 22, 1987 agreement, except sales identified in said agreement, between the Bureau of Land Management and the Oregon Department of Fish and Wildlife. Not later than thirty days after enactment of this Act, the Bureau of Land Management, after consulting with the Oregon Department of Fish and Wildlife Service to identify high priority spotted owl area sites, shall select an additional twelve spotted owl habitat areas. No timber sales may be offered in the areas identified pursuant to this subsection during fiscal year 1990.

II. SECTION 318(B)(6)(A) IS A PERMISSIBLE EXERCISE OF CONGRESSIONAL AUTHORITY OVER PUBLIC LANDS

A. Acts of Congress Are Presumed To Be Constitutional

When a party calls into question the constitutionality of an Act of Congress, the appellate court assumes "'the gravest and most delicate duty [an appellate court] is called on to perform.'" *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)). Federal statutes are entitled to a presumption of constitutionality. *See Walters v. National Ass'n of Radiation Survivors*, 468 U.S. 1323 (1984). As Judge Dwyer recognized below in his opinion holding section 318(b)(6)(A) constitutional, courts are to construe federal statutes "'so as to avoid serious doubts as to their constitutionality, and when faced with such doubts the [c]ourt will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid.'" *Seattle Audubon Society v. Robertson*, Civil No. 89-160-WD, Memorandum Decision Re: Constitutionality and Retention of Jurisdiction at 6 (W.D. Wash. Nov. 14, 1989) (quoting *Communications Workers of Am. v. Beck*, 487 U.S. 735, 762-63 (1988) (Petition for Certiorari at 25a.)).

B. Section 318 Can Fairly Be Construed As a Constitutionally Valid Temporary Displacement of Pre-Existing Environmental Laws

In *Seattle Audubon Society v. Robertson*, Judge Dwyer held that "Section 318 can and must be read as a *temporary* modification of the environmental laws. As such it is well within Congress' constitutional power." *Seattle Audubon Society v. Robertson*, Civil No. 89-160-WD, Memorandum Decision Re: Constitutionality and Retention of Jurisdiction at 6 (emphasis added) (Petition for Certiorari at 25a.). In *Portland Audubon Society v. Lujan*, Judge Frye adopted Judge Dwyer's reasoning and also held that section 318 was constitutional. *Portland Audubon Society v. Lujan*, Civil No. 87-1160-FR (D. Or. Dec. 21, 1989) (Petition for Certiorari at 37a-38a.).

The environmental groups concede, and the Court of Appeals specifically acknowledged, that if section 318 is interpreted as a temporary modification or repeal of the environmental laws that provide the basis for the claims in this case, then section 318 is constitutional. *Portland Audubon Society v. Lujan*, Ninth Circuit No. 90-35120, Appellants' Opening Brief at 14; *Seattle Audubon Society v. Robertson*, No. 90-35120 (Oct. 30, 1990) (Petition for Certiorari at 11a.). To support its judgment below, the Court of Appeals characterized section 318 instead as an attempt to "prescribe[] a rule for the decision of a cause in a particular way, without changing the underlying laws . . . ." (Petition for Certiorari at 16a.) In adopting this characterization, the Ninth Circuit panel

failed to adopt an available and proper interpretation that would have sustained section 318. Setting aside the question of whether there is a valid distinction between prescribing a rule of decision and changing underlying law,[2] section 318 clearly can be interpreted as a modification or partial repeal of FLPMA and the other environmental laws invoked by the environmental groups in the district courts below. The wording and legislative history of section 318 support such a construction. In the first sentence of section 318(b)(6)(A), Congress specifically stated that it was not passing on "the legal and factual adequacy" of the Forest Service and BLM documents challenged by the environmental groups. Rather, Congress' clear intent was to render the named lawsuits temporarily moot by adopting its own statutory management plan

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[2] In *In re Consolidated United States Atmospheric Testing Litigation*, a case relied upon by the Court of Appeals below, the Court of Appeals held that "'Congress violates the separation of powers when it presumes to dictate "how the Court should decide an issue of fact (under threat of loss of jurisdiction)" and purports to "bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds."'" *Atmospheric Testing*, 820 F.2d 982, 992 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988) (quoting *United States v. Brainer*, 691 F.2d 691, 695 (4th Cir. 1982) (quoting P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* at 316 n.4 (2d ed. 1973))). As the Court of Appeals correctly concluded in *Atmospheric Testing* but now disaffirms, the separation of powers principle is violated only when Congress presumes to dictate how an Article III Court should decide *an issue of fact*.

and prohibiting judicial review of the agencies' implementation of the plan.[3]

Nor did Congress proclaim, as the environmental groups seem to contend, that the measures adopted in section 318 meet the requirements of FLPMA or the other environmental statutes that provided the bases for the claims in the district courts. The legislative history establishes that Congress was making a policy judgment about how to address the environmentalists' concerns about the spotted owl, rather than pronouncing a conclusion of law: "This expanded reservation of areas for spotted owls again is deemed *adequate to address* for fiscal year 1990 only

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[3] The House Conference Report states:

> Section (b)(6)(A) does not pass on the legal sufficiency of the . . . BLM/ODFW agreement insofar as each addresses concerns about the northern spotted owl. However, inasmuch as subsection[] . . . *(b)(5) establish[es] interim [Spotted Owl Habitat Area] standards* for the fiscal year 1990 which protect more habitat than currently protected by the . . . BLM, *subsection (b)(6)(A) removes for fiscal year 1990 the sufficiency or insufficiency of those standards* as a reason for injunctive relief.

H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 88, 89 (1989) (emphasis added); *see also id.* at 88 ("[t]he legal adequacy of and prohibition against judicial review of the SOHA framework established in this section should not be construed to moot future action after fiscal year 1990 in the *Portland Audubon Society v. Lujan* case"). In other words, the standards supplied in other legislation by which forest management is normally judged were temporarily replaced by section 318's standards. Section 318's interim standards were plainly a temporary modification of the statutory bases for the underlying claims in *Portland Audubon Society v. Lujan*.

the concerns raised in the *Portland Audubon Society v. Lujan* case." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 88 (1989) (emphasis added).

Thus, among two possible interpretations of section 318, the district courts chose an interpretation that would render the Act of Congress constitutional, while the Court of Appeals chose an interpretation that would render section 318 unconstitutional. Given the presumption of constitutionality afforded Acts of Congress and the rule that statutes are to be interpreted in a manner that renders them constitutionally valid, the Court of Appeals' interpretation of section 318 should be rejected. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const.*, 485 U.S. 568, 575 (1988) (courts are to construe statutes in such a manner as to avoid constitutional doubts, unless such construction is "plainly contrary to the intent of Congress").

C. The Court of Appeals Erroneously Concluded that It Could Not Find Section 318 To Be a Partial Repeal of Other Environmental Statutes

The Court of Appeals' reliance upon the "doctrine disfavoring repeals by implication" discussed in *TVA v. Hill*, 437 U.S. 153, 190 (1978), was misplaced. Congress could not have been clearer in specifying that section 318, rather than the other environmental statutes at issue in the district court cases, was to govern timber sales offered in fiscal year 1990. Where Congress' intent to supersede existing legislation is clear, there is no requirement that Congress expressly recite each statute affected by a new law. *See United States v. Will*, 449 U.S. 200, 222 (1980).

III. SECTION 318 CANNOT VIOLATE THE SEPARATION OF POWERS PRINCIPLE BECAUSE SECTION 318(B)(6)(A) PRECLUDES ANY FINDINGS OF LAW OR FACT WITH RESPECT TO THE STATUTORY MANAGEMENT PLAN SET FORTH IN SECTION 318

Finally, the Court of Appeals completely ignored the significance of the prohibition of judicial review set forth in the second sentence of section 318(b)(6)(A) which provides that "[t]he guidelines adopted by subsections (b)(3) and (b)(5) of [section 318] shall not be subject to judicial review by any court of the United States." By adopting the section 318 guidelines and eliminating the federal courts' jurisdiction to hear challenges to the guidelines, Congress did not "direct[] the courts to find that [the section 318 guidelines] satisfied the environmental laws underlying the ongoing litigation." (Petition for Certiorari at 16a.) Quite the contrary: Section 318(b)(6)(A) substitutes new guidelines for those stemming from existing environmental laws and forbids, rather than compels, the courts to make findings of fact or law with respect to the new guidelines. Therefore, section 318 does not violate the separation of powers principle.

CONCLUSION

The O & C Counties urge this Court to reverse the Court of Appeals' judgment.

Respectfully submitted.

*Phillip D. Chadsey
Kevin Q. Davis

STOEL RIVES BOLEY
JONES & GREY
900 S.W. Fifth Avenue
Portland, Oregon, 97204
Telephone: (503) 224-3380

Of Attorneys for Respondents
the Association of O & C
Counties and Benton County

*Counsel of Record

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In The

Supreme Court of the United States

October Term, 1991

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,

Petitioners,

v.

SEATTLE AUDUBON SOCIETY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS SEATTLE AUDUBON SOCIETY, ET AL.

VICTOR M. SHER
TODD D. TRUE*
SIERRA CLUB LEGAL DEFENSE FUND
216 First Avenue South
Suite 330
Seattle, Washington 98104
(206) 343-7340

Attorneys for Plaintiffs Seattle Audubon Society, et al.

JOHN BONINE
MICHAEL AXLINE
University of Oregon
School of Law
1101 Kincaid Street
Room 329
Eugene, Oregon 97403
(503) 346-3823

Attorneys for Plaintiffs Oregon Natural Resources Council and Lane County Audubon Society

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Was the Ninth Circuit Court of Appeals correct in holding that section 318 (b)(6)(A) of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747 (1989), violates the constitutional separation of powers by directing two federal district courts how to apply existing laws in two specifically named pending cases for one fiscal year?

PARTIES TO THE PROCEEDINGS

Respondents accept petitioners' description of the parties to the proceedings. All of the respondent plaintiffs in No. C89-160(WD) (W.D. Wash.) and all of the respondent plaintiffs in No. C87-1160-FR (D. Or.) are not-for-profit corporations and none of them has any parent companies, subsidiaries, or affiliates. This statement is provided pursuant to Supreme Court Rule 29.1.

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Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 369, 374-75 (1976)..... 24

Sher, V. & Hunting, C., *Eroding the Landscape, Eroding the Laws: Congressional Exemptions From Judicial Review of Environmental Laws*, 15 Harv. Envtl. L. Rev. 435 (1991)..... 9

Wilkinson, C. & Anderson, H., *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1, 117 (1985)..... 3

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Strycker, "Is the Industry Doomed or 'Crying Wolf'?" Eugene Register-Guard, May 28, 1989..... 9

Lancaster, "Spotted Owl Flies into Political Crossfire," Wash. Post, June 21, 1989..... 9

Stein, "Loggers See Spotted Owl as a Harbinger of Doom," L.A. Times, July 14, 1989..... 9

No. 90-1596

In The

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October Term, 1991

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,

Petitioners,

v.

SEATTLE AUDUBON SOCIETY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS SEATTLE AUDUBON SOCIETY, ET AL.

STATEMENT

This case requires the Court to determine whether the "extraordinary measures . . . with regard to judicial processes," H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 87 (1989), contained in Section 318(b)(6)(A) of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 100-121, Tit. III, § 318, 103 Stat. 745-50 (1989), violate the Constitution's separation of powers.

These "extraordinary measures" were part of a last-minute amendment to an annual appropriations bill

included at the request of legislators from Oregon and Washington. The chief purpose of the amendment was to control the courts' adjudication of these cases and compel the sale of timber from U.S. Forest Service and Bureau of Land Management ("BLM") lands in Oregon and Washington.

The incursion Section 318 makes into the adjudicatory powers vested in the courts under Article III of the Constitution is apparent from the face of Section 318, the alternatives to Section 318 that Congress rejected, and the effects of Section 318 on the courts' ability to decide these cases.

BACKGROUND OF CASES

A. Administrative Actions And Initial Court Proceedings Underlying These Cases.

In the late 1980s, the Forest Service and BLM began to take steps to protect the northern spotted owl, a rare interior forest bird that depends on the remaining old-growth coniferous forests of western Oregon, Washington and northern California for its survival.[1] Section 1 sets forth the actions of the Forest Service, Section 2 those of the BLM.

1. Forest Service administrative actions and judicial review of these actions prior to Section 318.

The Forest Service first publicly adopted guidelines for managing spotted owl habitat in 1984 to meet the

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[1] For a discussion of the natural history, biology and management history of the northern spotted owl, *see* 55 Fed. Reg. 26114 (June 26, 1990) ("Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for Northern Spotted Owl; Final Rule").

biodiversity requirements of the National Forest Management Act ("NFMA"). 16 U.S.C. § 1604(g)(3)(B).[2] The agency also prepared an environmental impact statement ("EIS") pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, to accompany its guidelines for owl habitat and other forest management issues.[3]

The NFMA specifically directs the Forest Service to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area." 16 U.S.C. § 1604(g)(3)(B). The agency has implemented this "biodiversity" requirement through regulations directing that "fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species. . . ." 36 C.F.R. § 219.19. "The duty to maintain viable populations of existing vertebrate species requires planning for the

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[2] Passage of the NFMA in 1976 fundamentally altered the Forest Service's historical mission of selling timber from the public lands. *See* Wilkinson, C. & Anderson, H., *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1, 117 (1985). In the words of one of the NFMA's chief sponsors:

> The days have ended when the forests may be viewed only as trees and the trees viewed only as timber. The soil and the water, the grasses and the shrubs, the fish and the wildlife, and the beauty that is the forest must become integral parts of resource managers' thinking and actions.

122 Cong. Rec. 5619 (1976) (statement of Senator Humphrey).

[3] NEPA imposes on the Forest Service the procedural duty to fully consider and disclose the environmental consequences of and alternatives to any of its actions that may have significant environmental effects, including effects on wildlife such as the spotted owl. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-50 (1989); *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97-100 (1983).

entire biological community – not for one species alone." Br. Opp., App. at 49a (*Seattle Audubon Society v. Robertson*, C89-160WD, Order on Motions for Summary Judgment and for Dismissal (Mar. 7, 1991)). Thus, Forest Service has designated the northern spotted owl an "indicator species," *id.* at 50a, whose habitat the agency manages in order to protect other wildlife that also survives in similar habitat. *See* 36 C.F.R. § 219.19 (describing indicator species management).

Several environmental groups successfully pursued an administrative appeal of the 1984 Forest Service owl habitat guidelines and EIS, arguing that the guidelines did not meet the biodiversity requirements of the NFMA and that the EIS failed to disclose the environmental consequences to the owl from logging. J.A. at 65. In 1988, the agency issued new guidelines for owl habitat and a supplemental EIS. The new guidelines, like the 1984 guidelines protected suitable habitat around individual owls.[4] Environmental groups again asked

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[4] The inadequacy of the 1988 Forest Service guidelines to protect the owl, among other things, led the U.S. Fish and Wildlife Service ("FWS") in June of 1990 – while Section 318 was in effect – to list the owl as a "threatened" species under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* *See* 55 Fed. Reg. 26114 (June 26, 1990) ("Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl; Final Rule). Several months before the FWS listed the owl as threatened, but also while Section 318 was in effect, an Interagency Scientific Committee ("ISC") concluded that the Forest Service and BLM actions challenged in these cases were "a prescription for the extinction of spotted owls, at least in a large proportion of the owl's range." *Seattle Audubon Society v. Robertson*, C89-160WD, Government's Exh. 1 (Hearing of April 30, 1991) at 39. The ISC proposed a new management program for the owl that would increase significantly the acreage of protected forests. The new plan would replace the Forest Service and BLM system of protecting only individual owl pairs

for an administrative review of these guidelines and the supplemental EIS, but the agency rejected this appeal. J.A. at 67.

In February of 1989, the Seattle Audubon Society and others ("SAS") filed one of these cases, *Seattle Audubon Society v. Robertson*, C89-160WD (W.D.Wash.) (hereinafter "*SAS*"), seeking judicial review of the Forest Service's 1988 owl guidelines and the accompanying supplemental EIS under the provisions of the Administrative Procedures Act, 5 U.S.C. §§ 702, 706 ("APA"). J.A. at 57. SAS asserted that the Forest Service owl guidelines violated the requirements of NFMA, NEPA and the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. § 703. *Id.*[5] In March of 1989, the district court preliminarily enjoined approximately 165 specific Forest Service timber sales for likely violations of NFMA and NEPA. J.A. at 14. The court also set an early trial date of June 13, 1989, for a final hearing in the case. *Id.* Following a stay of proceedings in May of

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in small preserves called "spotted owl habitat areas" or "SOHAs" with large forest reserves called "habitat conservation areas" or "HCAs" that protect up to 20 pairs of owls each. *Id.* at 23-30. To date, neither the Forest Service nor the BLM has adopted this proposed management plan. Br. Opp., App. at 26a (*Seattle Audubon Society v. Robertson*, C89-160WD, Memorandum Decision and Injunction (May 23, 1991)).

[5] The MBTA protects the spotted owl. 50 C.F.R. § 10.13. SAS alleged that the MBTA prohibited the killing or taking through habitat destruction of such protected species. The district court rejected this claim, *see* Br. Opp., App. at 59a (*Seattle Audubon Society v. Robertson*, No. C89-160WD, Order on Motions for Summary Judgment and for Dismissal (March 7, 1991)). SAS has appealed this ruling and the case is pending in the Ninth Circuit. *Seattle Audubon Society v. Robertson*, Ninth Cir. No. 91-35528 (argued and submitted Aug. 29, 1991).

1989, the court rescheduled a trial for November 13, 1989.[6]

Before the scheduled hearing date, Congress enacted Section 318 and, as explained below, the district court stopped all proceedings on plaintiffs' claims. *See infra* section C.

2. BLM administrative actions and judicial review of these actions prior to Section 318.

Between 1978 and 1983, BLM adopted timber management plans ("TMP"), accompanied by EISs for its five western Oregon districts. These plans embodied the BLM's version of the scheme for owl habitat management that the Forest Service used in its 1984 and 1988 guidelines. In 1986, under pressure from conservation organizations, BLM prepared an "environmental assessment," *see* 40 C.F.R. § 1501.3 & 1508.9 (environmental assessments), to review whether new scientific information regarding the spotted owl warranted a revision of the agency's TMPs and EISs. BLM concluded that no supplements were necessary.

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[6] In May of 1989 the Forest Service asked the district court for a stay of all proceedings while it took 30 to 60 days to develop new owl habitat guidelines. J.A. at 15. The Forest Service failed to produce the promised revised guidelines. Instead, in August of 1989, the agency asked the district court to release eleven specific timber sales from the preliminary injunction and stay orders. *Id.* at 16. The district court refused this request observing that it would lead to "the piecemeal dismantling of a preliminary injunction rather than . . . a final decision on the merits" and that the Forest Service had not produced the interim spotted owl protection promised. *Id.* at 16-17. The court subsequently dissolved its stay of proceedings, continued its preliminary injunction and set a trial date of November 13, 1989. *Id.*

In October of 1987, the Portland Audubon Society and others ("PAS") filed the second of these consolidated cases, *Portland Audubon Society v. Lujan*, C87-1160-FR (D.Or.) (hereinafter *"PAS"*), seeking review under the APA of the BLM's decision not to modify or supplement its existing TMPs and EISs. PAS alleged that the agency's actions violated the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*, NEPA, and the MBTA. J.A. at 42.[7] In April of 1988, the district court dismissed the complaint because of language directed at the case in an amendment to the Department of Interior and Related Agencies Appropriations Act for Fiscal Year

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[7] FLPMA, which is specifically applicable to the BLM, requires the agency to consider wildlife protection measures in managing its forests. Thus, FLPMA requires the BLM to manage its lands on the bases of multiple use and sustained yield. 43 U.S.C. § 1701(a)(7). The Act defines "multiple use" as management for recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values. 43 U.S.C. § 1702(c). The Ninth Circuit has ruled that FLPMA requires consideration by BLM of all of these multiple uses, including wildlife protection. *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1182 (9th Cir. 1990), *rehearing denied*, 940 F.2d 435 (9th Cir. 1991). NEPA, of course, requires the BLM to consider and disclose the environmental consequences of any action it takes that may have significant environmental effects. *See supra* note 3. PAS' claim under the MBTA paralleled that of SAS, *see supra*, note 5. The district court has dismissed this claim, Br. Opp., App. 101a (*Portland Audubon Society v. Lujan*, No. 87-1160-FR, Opinion (D.Or. May 8, 1991)). PAS has appealed and the appeal is pending. *Portland Audubon Society v. Lujan*, Ninth Cir. No. 91-35782 (argued and submitted Aug. 29, 1991). Plaintiffs' complaint also included a claim for a violation of the Oregon and California Lands Act, 43 U.S.C. § 1181. The district court has denied this claim, Br. Opp., App. at 96a-99a, and plaintiffs have not appealed.

1988, Sec. 314, Pub.L. No. 100-202, Tit. III, 101 Stat. 1329-254 (1987). J.A. at 2.[8]

In January of 1989, the court of appeals reversed the district court's dismissal of PAS' complaint and dissolved an injunction it had granted pending appeal. *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), *cert. denied*, 492 U.S. 911 (1989). Subsequently, after concluding that the BLM had violated NEPA by failing to supplement its existing environmental impact statements in light of new and likely credible information regarding the impacts of logging on the spotted owl, the district court again dismissed the case, based on the same appropriations act amendment it had relied on to dismiss the case before. *Portland Audubon Society v. Lujan*, 712 F.Supp. 1456 (D.Or. 1989).[9]

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[8] This appropriations rider provided in pertinent part:

> [T]he Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending completion of new plans. Nothing shall limit judicial review of particular activities on these lands: *Provided, however*, That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan. *Provided further*, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

101 Stat. 1329-254. The validity and effect of this provision are not at issue here.

[9] The amendment, first enacted for fiscal year 1988, had been reenacted for fiscal year 1989 as well. *See* Department of Interior and Related Agencies Appropriations Act for Fiscal

In September of 1989, the court of appeals reversed the district court's second dismissal of PAS' claims under FLPMA and the MBTA but affirmed the dismissal of the NEPA claim. *Portland Audubon Society v. Lujan*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990).

B. Section 318 Of The Department Of Interior And Related Agencies Appropriations Act For Fiscal Year 1990.

During the summer of 1989, the district courts' and court of appeals' rulings in these cases prompted protests from the Northwest timber industry.[10] Individual members of Congress from Washington and Oregon reacted by seeking to add an amendment to the annual appropriations act funding the Forest Service and the BLM in order to prevent these cases from interfering with any timber sales and compel the offer of both enjoined and prospective timber sales in spotted owl habitat during fiscal year 1990.[11] The Senate Appropriations Committee Report on

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Year 1989, Pub. L. No. 100-446, Tit. III, Sec. 314, 102 Stat. 1774, 1825-26 (1988).

[10] *See, e.g.*, Strycker, "Is the Industry Doomed or 'Crying Wolf'?" Eugene Register-Guard, May 28, 1989, at B1; Lancaster, "Spotted Owl Flies into Political Cross-fire," Wash. Post, June 21, 1989, at A21; Stein, "Loggers See Spotted Owl as a Harbinger of Doom," L.A. Times, July 14, 1989, at 1.

[11] These same members of Congress previously had added a number of amendments to annual appropriations acts to forestall judicial enforcement of the environmental laws that protect public forests in the Pacific Northwest. *See* Sher, V. & Hunting, C., *Eroding the Landscape, Eroding the Laws: Congressional Exemptions From Judicial Review of Environmental Laws*, 15 Harv. Envt'l L. Rev. 435 (1991) (providing a history of these appropriations act amendments).

the original version of Section 318 confirms that the rulings in these cases spurred Oregon and Washington legislators to take action:

> The need for this amendment arose from the interdiction of nearly 60 percent of the timber sales from public lands in Oregon and Washington. This interruption occurred as a result of court actions filed in U.S. district courts. . . . The Committee's immediate concern is the potential for considerable economic disruptions which are likely to occur if the injunctions remain in place.

S. Rep. No. 101-85, 101st Cong., 1st Sess. at 120 (July 25, 1989).

The central dispute in preparing the amendment was over how to remove the injunctions in these cases and control the disposition of the cases during the coming year. The original amendment, introduced by Senators Hatfield of Oregon and Adams of Washington, would have accomplished this goal by: (1) expressly repealing the laws at issue in these cases for a year; and (2) prohibiting the courts from issuing injunctive relief for any other violations of the law during this time. The final version of the amendment developed by a conference committee, however, took a different approach. Because the approach of the Senate amendment sparked vigorous objections in the House of Representatives, the revised amendment did not repeal the laws at issue in these cases but instead sought to directly control the disposition of these cases by instructing the courts how to interpret and apply the existing laws to Forest Service and BLM actions during fiscal 1990.[12]

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[12] Section 318, as an amendment to an appropriations bill, never received any congressional hearing, even though it raised

1. The Senate amendment.

On July 26, 1989, the Senate considered and passed a version of Section 318 that would have insulated fiscal year 1990 timber sales from challenge "notwithstanding any provision of law." 135 Cong. Rec. S8776 (daily ed. July 26, 1989) (setting forth amendment text) (reprinted as App. A hereto). The amendment also set a timber sale target, provided standards to assist in the selection of timber sales to meet the target, established advisory committees to comment on timber sale selection by each agency, and limited existing administrative appeal rights for timber sale decisions. App. A at 1a-4a.

Other provisions of the amendment allowed the parties to these cases to select from among the then enjoined timber sales those that would be released from the existing injunctions in return for statutory deferral of other enjoined sales during fiscal year 1990. *Id.* at 4a-5a. Subsection (h) of the amendment allowed the Forest Service and BLM to select *all* of the timber sales (including any enjoined sales if there was no agreement with the parties to these cases) necessary to meet the overall timber target

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controversial issues and affected the operation of several of the most significant national environmental laws. Likewise, no authorizing committees of Congress with jurisdiction over the affected federal agencies or the laws that govern them ever reviewed the amendment. Nor did either of the judiciary committees in Congress consider the amendment even though it directly affected the functions of the federal courts. Instead, the amendment first appeared in the Senate Interior Appropriations Subcommittee on July 24, 1989, and the Senate passed it on July 26th. A House-Senate Interior Appropriations Conference Committee revised the amendment with like speed over several days in September of 1989.

of the amendment. *Id.* at 5a-6a. The Senate amendment then provided that sales selected by these agencies

> shall be prepared, advertised, awarded and operated notwithstanding any provision of law that is a basis for any stay, restraining order or injunction issued in [*Seattle Audubon Society v. F. Dale Robertson*, C89-160WD, and *Portland Audubon Society v. Lujan*, 87-1160-FR].

Id. at 6a.

> The amendment also stipulated that:
> No restraining order, injunction, or void of sale shall be issued by any court of the United States in fiscal year 1990 with respect to any decision to prepare, advertise, offer, or award timber sales from the thirteen national forests in Oregon and Washington and public lands in western Oregon known to contain northern spotted owls.

Id. A technical amendment, added later, stated: "*Provided*, That the courts shall have authority to void a sale if it has been determined by a trial on the merits that such sale should not be awarded." *See* 135 Cong. Rec. S8791 (daily ed. July 26, 1989).[13]

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[13] The Senate debate on this amendment highlighted the central role that control of these cases played in shaping the amendment. Senator Leahy of Vermont, the Chair of the Agriculture Committee, the committee with jurisdiction over the Forest Service and the laws that govern it, and a member of the Judiciary Committee objected to the Senate amendment:

> the right of our citizens to seek redress of their grievances against governmental action before an impartial third party is a basic principle of our system of government.
>
> In the debate over the future of the ancient forests, a subtle but serious attempt to circumvent this right has developed.
>
> To achieve a temporary resolution to this long-term controversy, an amendment to limit the

2. The conference committee amendment.

Following passage in the Senate, the appropriations bill, including the Hatfield/Adams amendment, went to an appropriations conference committee to resolve differences between the Senate and House versions of the bill. Before this conference committee met to consider the bill, however, more than 100 members of the House sent a letter to Representative Sidney R. Yates, the Chairman of the House Interior Appropriations Subcommittee, expressing strong opposition to the provisions of the Hatfield/Adams amendment directed at insulating the Forest Service and BLM from the requirements of the laws at issue in these cases. *See* Letter of Sept. 11, 1989, to The Honorable Sidney R. Yates (reprinted as App. B hereto).[14]

> public's right to due process through the courts has been included in this legislation.

135 Cong. Rec. S8790 (daily ed. July 26, 1989). Senator Leahy ultimately did not offer an alternative amendment of his own because Senator Hatfield assured him that the Hatfield/Adams amendment was only a temporary measure and that "[t]he long-term solution is to jealously protect the existing laws unless, through oversight, those laws through the authorizing process, are determined to be amended." *Id.* (statement of Senator Hatfield). Senator Leahy also observed that "normally, every Senator, especially the senior Senator from Vermont, defers to the Senators from a State or region in matters relating to that region." *Id.* at S8789.

[14] These Representatives urged Chairman Yates and the conference committee to eliminate the Hatfield/Adams language from the final appropriations bill because it:

> effectively insulate[s] the Forest Service and the Bureau of Land Management from judicial remedies imposed under the Endangered Species Act, the National Forest Management Act, the National Environmental Policy Act, the Clean Water Act and any other federal law. This insulation is contrary to our

In response to the objections of so many House members, the conference committee re-wrote the crucial portions of the original Hatfield/Adams amendment directed at these cases and replaced them with subsection 318(b)(6)(A). The conference committee amendment thus did not directly "insulate the Forest Service and the Bureau of Land Management from . . . the Endangered Species Act, the National Forest Management Act, the National Environmental Policy Act, the Clean Water Act and any other federal law," *see* App. B, as subsection (h)(1) of the Senate amendment had. Instead, as the conference report on Section 318 states explicitly:

> [t]his section in no way alters application of the Endangered Species Act or other environmental laws to Forest Service and BLM management activities.

Br. Opp., App. at 122a.

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concept of justice because it will limit the ability of citizens to obtain judicial remedies to illegal agency activities.

The Hatfield/Adams amendment threatens to remove administrative decisions – no matter how illegal – from effective judicial remedies. In addition, this insulation of agency activities has not been subject to the scrutiny of the authorizing committees with appropriate jurisdiction over the management of our nation's forests and wildlife resources.

. . .

We therefore urge the conference committee to retain the relevant forestry sections of the House version of the Interior Appropriations Bill during the upcoming deliberations on this bill.

App. B. The House version of the bill did not address these cases in *any* way. H. Rep. No. 101-120 (to accompany H.R. 2788), 101st Cong., 1st Sess. (June 29, 1989).

Although the conferees reassured other members of Congress that the conference amendment had avoided the approach of the Senate amendment, the actual language of the conference amendment still compelled the offer of enjoined and prospective timber sales. It did so, however, by telling the courts in these cases how to interpret and apply the existing unchanged environmental laws for fiscal year 1990. The conference committee thus used legislation aimed at controlling the decisions of the courts in these cases to accomplish indirectly what it was unwilling to attempt to do directly because of opposition to repealing or amending the underlying laws.

3. The provisions of Section 318.

The provision of Section 318 that addresses the disposition of these cases for fiscal year 1990 begins by disclaiming any intention to decide permanently whether Forest Service and BLM administrative actions meet the requirements of the environmental laws. Pet. Br., App. at 5a. It then, however, decides this question in these cases for agency actions during fiscal year 1990 by

> determin[ing] and direct[ing] that management of areas according to subsections (b)(3) and (b)(5) of this section . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al. v. F. Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc. et al. v. F. Dale Robertson*, Civil No. 89-99 (order granting preliminary injunction) and the case *Portland Audubon Society et al v. Manual Lujan, Jr.*, Civil No. 87-1160-FR.

Id. at 5a-6a. The new subsection concludes by attempting to remove completely from judicial review the statutory standards of sections 318(b)(3) and (b)(5). *Id.* at 6a.

Other parts of Section 318 retained a revised timber sale target from the Senate amendment, *id.* at 1a-2a, and replaced the Senate's criteria to assist the Forest Service and BLM in the selection of timber sales during fiscal year 1990 with the provisions of subsections (b)(1) through ~~(b)(5)~~.[15] *Id.* at 2a-5a. Two of these guidelines, subsections (b)(3) and (b)(5), place certain Forest Service and BLM lands that contain suitable spotted owl habitat off-limits to logging for a year.[16] The other provisions of

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[15] The conference committee also retained the Senate's creation of advisory committees, special reporting requirements, and called on the Forest Service to reconsider its owl management program. *See* Pet. Br., App. at 6a-7a, 12a. In addition, the conference committee wrote a new subsection (g) that allowed judicial review of timber sale decisions for any claim other than those decided in subsection (b)(6)(A), provided that the party seeking review filed its request within 15-days of the date on which the government advertised the timber for sale. *See id.* at 10a-12a. Finally, the conference committee retained the Senate mechanism for allowing the parties to these cases to select, with agency concurrence, the timber sales that the statute would release from the courts' injunctions. *See id.* at 9a-10a. This revised subsection (*f*) focused only on the Forest Service because by the time the conference committee met, there was no pending injunction in *Portland Audubon Society v. Lujan*. *See supra* at 8. The revised subsection (f) also addressed only enjoined timber sales that would have been sold in fiscal year 1989. It did not address any prospective fiscal year 1990 sales or attempt to direct the offer of such prospective sales "notwithstanding" contrary legal requirements as the Senate amendment had. *Compare* Section 318(f)(1)-(3), Pet. Br., App. at 9a-10a *with* App. A at 4a-6a (subsections (f), (g) and (h)(1)).

[16] For the Forest Service, these areas, their size, and their spacing are identified in subsections 318(b)(3)(A) through (F).

subsection (b) assist the Forest Service in selecting timber sales from the remaining national forest lands, including lands that contain owls and owl habitat. *Id.* at 2a-5a.

Apart from the direction to the courts in subsection 318(b)(6)(A), these guidelines complement the Forest Service and BLM's separate statutory duties under the laws at issue in these cases. Thus, while the Forest Service, for example, must stay out of the areas specified in subsection (b)(3), and must "minimize fragmentation" from timber sales in the "most ecologically significant old growth forest stands," *see* Pet. Br., App. at 2a-3a (§§ 318(b)(1) & (b)(2)), it still must determine whether the lands unaffected by timber sales, together with the lands placed off limits in subsection (b)(3) and other applicable laws, will assure the owl's continued viability. 36 C.F.R. § 219.19. Of course, the agency also must discuss and disclose the environmental consequences of and alternatives to the timber sales it selects as NEPA requires. Subsection (b)(6)(A), however, directs that, so long as Forest Service actions meet the subsection (b)(3) guidelines, the courts are to treat these actions as complying with the agency's separate and unchanged statutory duties under the NFMA and NEPA.

The appropriations bill that contained Section 318 passed the House on October 3, 1989, and the Senate on

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Pet. Br., App. at 3a-4a. Subsections (A) through (D) set the overall size of the areas while subsection (F), through its reference to the "standards and guidelines contained in the Chief's Record of Decision," sets the spacing of protected areas, type of habitat, and location and configuration requirements for the protected areas. *Id.*; *see also* J.A. 78-87 (Standard and Guidelines).

October 7, 1989.[17] On October 23, 1989, the President signed the bill, including Section 318, into law.

C. Judicial Proceedings After Passage Of Section 318.

Once Section 318 became law, both the Forest Service and the BLM asked the district courts in these cases to

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[17] Although many members of the congressional delegations from Oregon and Washington made floor statements in support of Section 318, there was no further debate on the amendment. Senator Biden, the Chairman of the Senate Judiciary Committee, however, during the Senate's consideration of the conference bill that contained the revised Hatfield/Adams amendment stated:

> [T]here is one aspect of the conference report that continues a disturbing trend of the past few years. That is the limitations on judicial review of environmental issues that have been included in recent Interior appropriations bills. The compromise reached by the conference may be viewed as an improvement over restrictions imposed in previous years, but it is still ad hoc meddling in established court procedures for dealing with environmental concerns.
>
> This is a habit Congress must break. Some may consider the conference agreement a victory because it moves in the right direction. I disagree. It continues a wrong-headed and potentially devastating practice of using legislation approved with no public review to undermine environmental laws that were developed through a lengthy public process.
>
> When economic concerns and environmental law conflict, the law should be reviewed, not circumvented. If it is unreasonable, it should be changed. If the law is simply the scapegoat for changing economic conditions, continuing to undermine it year after year does no one any good.

135 Cong. Rec. S12983 (daily ed. Oct. 7, 1989).

halt further proceedings, dissolve the existing injunctions, and dismiss the complaints. The district courts granted these requests. Following the court of appeals decision holding section 318(b)(6)(A) unconstitutional, however, the district court in one of these cases, *Seattle Audubon Society v. Robertson* ("*SAS*"), ruled that sixteen Forest Service timber sales in spotted owl habitat violated the NFMA and NEPA.

On November 7, 1989, the district court in *SAS* issued a brief ruling upholding Section 318 as constitutional and canceling the pending trial date. Pet. App. 29a-34a. The court followed this order with a memorandum opinion regarding the constitutionality of Section 318 in which the court concluded that "[s]ection 318 can and must be read as a temporary modification of the environmental laws." Pet. App. 25a.[18]

In *Portland Audubon Society v. Lujan* ("*PAS*"), the government moved to dismiss the case as moot in light of the provisions of Section 318 and the agency's then current plans to complete new timber management plans and EISs by the end of fiscal year 1990. J.A. at 8. The district court granted the government's motion and dismissed PAS' complaint for a third time. *Id.* at 8-9. The court adopted the constitutional analysis of Section 318 in the district court's opinion in the *SAS* case. Pet. App. 38a-40a.

SAS and PAS appealed both decisions and, in September of 1990, the court of appeals ruled that section 318(b)(6)(A)

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[18] The court also determined that it would not dismiss the case but would retain jurisdiction so that, with respect to individual timber sales challenged under section 318(g), "the parties [could] proceed by motion in these cases rather than having to start a new lawsuit." Pet. App. 28a.

> [did] not establish new law, but direct[ed] the courts to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court. This is what [*United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871)] and subsequent cases agree is constitutionally proscribed.

Pet. App. 14a. Although the court recognized that it "must uphold a statute if 'it is fairly possible to interpret the [challenged] statute in a manner that renders it constitutionally valid,' " *id.* at 15a (citations omitted), the court concluded that the "language of section 318 is clear" and, even though "Congress could possibly have written a valid statute[,] [that] does not mean that we can 'fairly' interpret the statute . . . Congress in fact enacted as constitutionally valid." *Id.* at 15a-16a. Accordingly, the court of appeals held that "[t]he first sentence of subsection (b)(6)(A) violates the separation of powers doctrine." *Id.* at 17a.[19]

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[19] In July of 1990 in a case unrelated to either of these cases, the timber industry sued the Forest Service seeking a writ of mandamus to compel the agency to sell the quantity of timber specified in Section 318(a)(1). The district court denied the writ concluding specifically that subsection (a)(1) only set a timber sale "mark" or target that the Forest Service and BLM were to attempt to achieve consistent with other legal requirements:

> The prediction of the Forest Service that it will not be able to meet the level of sale of timber set by Congress [in section 318(a)] does not allow the court to order the Forest Service to sell timber which the agency has determined to be inconsistent with the requirement of its duty under the law. The Forest Service's determination that it cannot meet the 7.7 [billion board feet] timber sales level and at the same time meet the requirements of all of the provisions of section 318

Immediately after the court of appeals ruling, SAS asked the district court in *Seattle Audubon Society v. Robertson* to enjoin twelve Forest Service timber sales offered under Section 318 for violations of the environmental laws at issue in these cases. SAS challenged these sales within fifteen days of advertisement as section 318(g)(1) requires. The district court granted SAS' request, ruling that:

> [T]he NFMA and its implementing regulations require that the Forest Service provide for diversity of plant and animal communities [and] [p]opulation viability of native vertebrate species. . . . NEPA and its implementing regulations direct procedures to insure that public officials are provided reasonable alternatives before decisions are made or actions are taken.
>
> . . .
>
> The agency has not shown that these other requirements have been met.

Br. Opp., App. at 140a.[20]

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and all other applicable laws is entitled to deference at this point in time.

Gifford Pinchot Alliance v. Butruille, 742 F.Supp. 1077, 1083 (D.Or. 1990) (action for mandamus during fiscal year 1990 to compel sale of additional timber under section 318); *see also Gifford Pinchot Alliance v. Butruille*, 752 F.Supp. 967 (D. Or. 1990) (same conclusion).

[20] SAS also challenged six additional Section 318 timber sales for violations of NFMA, NEPA and the MBTA outside the fifteen-day limitation period of section 318(g)(1). Following a ruling by the Ninth Circuit that the limitations period was tolled for these sales while section 318(b)(6)(A) was in effect, *see Seattle Audubon Society v. Robertson*, 931 F.2d 590 (9th Cir. 1991), the district court enjoined four of the sales that had not been logged. Br. Opp., App. at 85a-88a.

As all of these proceedings make clear, Congress directed section 318(b)(6)(A) only at the courts' ability to decide the specific claims in these cases during fiscal year 1990.[21] The Section – as the conference report states – did not repeal the application of the existing environmental laws to the Forest Service or the BLM, nor did it occupy the field that these statutes regulate, even for a year.

SUMMARY OF ARGUMENT

In Section 318 Congress attempted to direct the courts to resolve these cases in favor of the government

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[21] In separate proceedings, on September 28, 1990, the Forest Service vacated the spotted owl guidelines that had been the model for some of the provisions of Section 318. *See* 55 Fed. Reg. 40413 (October 3, 1990). In place of the old plan, the agency announced an interim approach to managing suitable northern spotted owl habitat. *Id.* SAS amended its complaint to challenge this new agency action for violations of NFMA, NEPA and the MBTA. *See* Br. Opp., App. at 39a-40a (Order on Motions for Summary Judgment and For Dismissal). On March 7, 1991, the district court ruled that the new Forest Service administrative plan violated NFMA, *id.* at 64a, and on May 23, 1991, following an eight-day hearing, the court permanently enjoined the Forest Service from selling additional timber sales in owl habitat until the agency complies with the law, *see* Br. Opp., App. at 36a-37a (Memorandum Decision and Injunction). The Forest Service and timber industry have appealed these separate rulings and the appeals are pending in the Court of Appeals. *Seattle Audubon Society v. Robertson*, Ninth Cir. Nos. 91-35529, 91-35563 & 91-35782.

Following the end of fiscal year of 1990, PAS also asked the district court to enjoin certain BLM timber sales in spotted owl habitat. The district court, however, again dismissed PAS' complaint. *See* Br. Opp., App. at 88a-104a. PAS has appealed this dismissal and is awaiting a decision from the court of appeals. *Portland Audubon Society v. Lujan*, Ninth Cir. Nos. 91-35002 and 91-35992 (argued and submitted Aug. 29, 1991).

for fiscal year 1990. In doing so, Congress usurped the adjudicative function of the courts. Article III of the Constitution and the separation of powers principle articulated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), and other decisions of this Court, forbid Congress from exercising such judicial powers.

The Constitution allocates the power to decide particular cases to an independent judiciary. The framers of the Constitution separated the legislative and judicial powers because they were acutely aware of the dangers posed by a legislature that could sit in judgment on individual cases. The decisions of this Court have jealously guarded this delegation of power to the courts to decide particular cases. *See* Section I.

The provisions of section 318(b)(6)(A) violate the separation of powers precisely because they seek to instruct the courts how to adjudicate specific pending cases. The statute says plainly "Congress determines and directs" that the courts are to consider certain Forest Service and BLM actions "adequate . . . for the purpose of meeting the statutory requirements that are the basis for" the claims in these cases. Congress made it clear both in the conference report on Section 318, and by its rejection of alternative language in the Senate bill, that this direction to the courts did not repeal or amend the existing environmental laws. Rather than change the legal requirements of the underlying laws, Congress simply told the courts how to rule in these cases. *See* Section II.

There could hardly be a clearer congressional direction to the courts to resolve a pending case in a certain way. Congress enacted a last-minute appropriations rider directing the courts to interpret and apply the law in these cases in favor of the government as a politically

convenient measure. In this way, Congress "passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. (13 Wall.) at 146-47.

ARGUMENT

I. THE CONSTITUTIONAL SEPARATION OF POWERS PREVENTS CONGRESS FROM EXERCISING AN ADJUDICATIVE ROLE IN PARTICULAR CASES

"Time and again" this Court has affirmed "the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches." *Morrison v. Olson*, 487 U.S. 654, 693 (1988). The framers of the Constitution created this separation of powers because they recognized that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointive, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47 at 324 (J. Cooke ed. 1961) (J. Madison).[22] This "system of separated

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[22] This recognition was grounded in immediate experience. During the Confederation of States that preceded the constitutional convention:

> The supremacy of the legislatures came to be recognized as the supremacy of factions and the tyranny of shifting majorities. The legislatures confiscated property, erected paper money schemes, [and] suspended the ordinary means of collecting debts.

Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 369, 374-75 (1976). "One abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures." *INS v. Chadha*, 462 U.S. 919, 961-63 (1983) (Powell, J., concurring) (noting contemporaneous records of legislatures exercising the judicial power).

powers and checks and balances [is] 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another.' " *Morrison*, 487 U.S. at 693 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

Where, as here, the separation of powers between the judicial and legislative branches of the government is at issue, the starting point for analysis is the explicit allocation of governmental powers in the Constitution. Article III, §§ 1 and 2 vest the judicial power in the Supreme Court and the lower federal courts and provide that this power shall extend "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties. . . . " Article I of the Constitution vests "[a]ll legislative powers herein granted . . . in the Congress of the United States. . . . " Under this separation of powers, as petitioners concede, Article III "has an important role to play in determining Congress' ability to affect pending litigation. [It] protects against invasion of the adjudicative function." Pet. Br. at 36.

A. The Constitution Vests In The Courts The Power To Interpret And Apply The Law In Order To Decide Particular Cases.

Two early decisions of this Court, *State of Pennsylvania v. The Wheeling and Belmont Bridge Company*, 59 U.S. (18 How.) 421 (1855), and *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), establish the limits the Constitution imposes on Congress' ability to direct the courts' interpretation and application of the law to the facts in particular pending cases.

In *Wheeling Bridge*, the Court previously had ruled two bridges over the Ohio River were an obstruction to navigation under the existing laws that regulated navigation. 59 U.S. (18 How.) at 429. Subsequently, Congress

enacted a law designating the bridges "post-roads for the passage of the mails of the United States" and authorized the Wheeling and Belmont Bridge Company "to have and maintain their said bridges at their present site and elevation." *Id.* Congress also declared that the bridges were "lawful structures, in their present positions and elevations, and shall be so held and taken to be, any thing in any law or laws of the United States to the contrary notwithstanding." *Id.*

This Court concluded that the new law making the bridges post roads changed the substantive law governing interstate commerce and the bridges. *Id.* at 30. Under the new law, the Court's prior ruling regarding the bridges no longer applied:

> So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of congress, they are to be regarded as modified by this subsequent legislation; and although [the bridge] still may be an obstruction in fact, [it] is not so in the contemplation of the law.

Id.

Justice McLean, in dissent, urged that the new law could not be given effect because in it Congress had exercised the judicial power of deciding a particular case in violation of the separation of powers:

> The judicial power is exercised in the decision of cases; the legislative, in making general regulations by the enactment of laws. The latter acts from considerations of public policy; the former by the pleadings and evidence in a case. . . . The act declared the bridge to be a legal structure, and, consequently, that it was not a nuisance. Now, is this a legislative or a judicial act?

Id. at 440 (McLean, J., dissenting). The majority rejected this view, *not* because it found Congress had permissibly

exercised an adjudicative function in the case, but because Congress had legislated to change the governing substantive law:

> [S]ince the decree [of the Court], this right [of navigation] has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction.

Id. at 432.[23]

The Court's decision fifteen years later in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), makes this separation of powers analysis explicit. In *Klein*, plaintiff made a claim for money due from the government based on receipt of a pardon (which included the restoration of all property seized during the Civil War). *See United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542-43 (1869) (holding that receipt of a Presidential pardon established conclusive proof of loyalty and entitled the recipient to return of his property). Congress, however, added an amendment to an appropriations act, "with perhaps little consideration in either House of Congress," *Klein*, 80 U.S. at 143, to address the result in *Padelford* and the pending *Klein* case.

> The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it, both in the Court of Claims and in this court on appeal.

Id. at 144.

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[23] The Court in *Wheeling Bridge* recognized that there are limits on Congress' ability to affect the outcome of a pending case even by changing the applicable law. Thus, the Court noted that, to the extent the Court previously had determined the property and other rights of individuals, Congress could not change these by amending the governing law. 59 U.S. (18 How.) at 431.

The Court found this law unconstitutional because in it "Congress . . . inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147. The Court reached this conclusion only after carefully distinguishing *Wheeling Bridge*:

> No arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

Klein, 80 U.S. at 146-47.[24]

Klein and *Wheeling Bridge* thus stand for the straightforward proposition that Congress cannot direct the outcome of a particular pending case by instructing the courts how to

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[24] The *Klein* Court also offered as an alternative holding the observation that "[t]he rule prescribed is *also* liable to just exception as impairing the effect of a pardon." 80 U.S. at 147 (emphasis added); *see also* L. Tribe, *American Constitutional Law* § 3-5 at 50 & n. 34 (2d ed. 1988)(noting that the discussion of the pardon power in *Klein* is an alternate holding in the case). Neither the Court's discussion of the pardon power nor its discussion of the potentially manipulative effects of the law on the courts' jurisdiction to protect that power address the "limit which separates the legislative from the judicial power," *Klein*, 80 U.S. at 147, the Court's principle basis for invalidating the appropriations amendment.

interpret and apply the existing law to the specific pending claims.[25] Such an effort involves Congress in the

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[25] None of the other decisions of this Court that address *Klein* offers a conflicting interpretation of the case, *see* Pet. Br. at 44 & n. 40, 45 & n. 44 (citing cases). Indeed, the Court's decision in *Hart v. United States*, 118 U.S. 62, 66 (1886), actually confirms the separation of powers analysis in *Klein*. There, in addressing the effect of contemporaneous legislation and pardons on claims against the United States, the Court agreed that the legislation at issue in *Hart* "did not . . . attempt to prescribe to the judiciary the effect to be given to a pardon." *Id.* at 66. The Court then observed:

> [W]e do not depart, in the least, from what was held, on the subject of pardons, in . . . *United States v. Klein*, [80 U.S.] 13 Wall. 128 [(1871)] . . . . If the joint resolution had said nothing on the subject of a pardon, no pardon could have had the effect to authorize the payment out of a general appropriation, of a debt which a law of Congress had said should not be paid out of it. The pardon cannot have such effect ascribed to it [that is, to authorize a payment] merely because the joint resolution says that it shall not have such effect.

Id. at 67 (citations omitted). Thus the law at issue in *Hart* did not attempt to direct the judiciary how to decide a case under an existing but unchanged law as the statute did in *Klein*; instead, the joint resolution in *Hart* merely prohibited the payment of certain classes of claims against the United States, regardless of whether the claimant had received a pardon from the President.

Carlisle v. United States, 83 U.S. (16 Wall.) 147, 152 (1872), likewise neither narrowed the holding of *Klein* nor eschewed the basic principle that Congress cannot direct the judiciary how to apply a particular existing law in a particular pending case without changing the underlying law. Instead, in that case, the Court gave to the pardon at issue exactly the effect it adjudged the pardon to have in light of the earlier decisions in *Padelford* and *Klein*. *Id.* at 151-56.

adjudication of cases under Article III, a role forbidden to it by the separation of powers.[26]

B. The Separation Of Powers Doctrine Independently Protects The Courts' Adjudicative Role From Congressional Interference.

Although petitioners acknowledge that Article III and the separation of powers prevent Congress from usurping the courts' adjudicative function in particular cases, Pet. Br. at 36, petitioners also urge that only specific constitutional limitations, and not the Constitution's separation of powers, restrict the legislature's ability to direct the outcome of a pending case, *id.* at 34-37. In petitioners' view, Pet. Br. at 34-37, so long as a statute does not violate one of these explicit constitutional provisions, and Congress acts pursuant to one of its enumerated powers, Congress cannot

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Similarly, the more recent case of *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (plurality opinion), does not undercut the basic separation of powers analysis in *Klein* for the simple reason that the Court's concern in *Glidden* was to determine whether the Court of Claims is an Article III court, *id.* at 531-34, not to define the reach of Congress' powers to affect specific pending cases. The opinion in *United States v. Sioux Nation of Indians*, 448 U.S. 371, 404-405 (1980), also does not address *Klein* directly because there, as the Court noted, the statute did not attempt to direct the courts how to apply an existing law to a particular case without changing that law; instead, in *Sioux Nation* Congress "waived the defense of res judicata so that a legal claim could be resolved on the merits." *Id.* at 406 (emphasis added).

[26] This conclusion respects and upholds one of the central concerns that led the framers of the Constitution to separate the judicial and legislative powers into independent branches of government – the desire to avoid any potential abuse of power through "trial by legislature." *United States v. Brown*, 381 U.S. 437, 442 (1965) (quoted in *INS v. Chadha*, 462 U.S. at 962 (Powell, J., concurring)).

"pass[ ] the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. (13 Wall.) at 147. There are several reasons that this effort to limit the separation of powers should be rejected.

First, allowing Congress to exercise Article III powers except where such an exercise violates an independent constitutional limitation would eliminate the separation of powers protection of the courts' adjudicative function from any case that did not also raise other constitutional issues. If a Congressional enactment is an exercise of the "judicial Power" in a particular case, however, the statute violates Article III and the separation of powers doctrine whether or not the violation is accompanied by a separate constitutional defect. For this reason, Article III and the separation of powers stand as independent limits on Congress' ability to legislate a decision in a particular case. *Cf. Metropolitan Washington Airports Authority v. Citizens for the Abatement of Airport Noise Inc.*, ___ U.S. ___, 111 S. Ct. 2298 (1991) (striking down a law for a violation of the separation of powers between the legislative and executive branches even though the law did not violate any other constitutional requirement); *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928) (same).

Second, as this Court recently stated in applying the separation of powers to legislation, the actions of Congress are not immune to the constraints of the doctrine simply because Congress acts pursuant to one of its broad enumerated powers. *See Metropolitan Washington Airports Authority*, ___ U.S. at ___, 111 S. Ct. at 2309. Indeed, the Court in *Metropolitan Washington Airport Authority* agreed that there was in that case

> no question about the federal power [under the Property Clause] to operate the airports. The question is whether the maintenance of federal control over the airports by means of the Board

> of Review . . . is invalid . . . because Congress' continued control violates the separation of powers principle . . . .

Id. at 2309. Here too, the fact that Congress may have broad authority under the Property Clause to legislate general standards for management of the national forests and BLM lands does not allow Congress to decide these cases by invading the judicial power reserved to the courts in Article III.

Accordingly, the central issue in these cases is whether section 318(b)(6)(A) usurps the adjudicative power of the courts by directing the courts how to interpret and apply the existing law in order to achieve a particular result.

II. CONGRESS ATTEMPTED IN SECTION 318(b)(6)(A) TO DIRECT THE COURTS TO RESOLVE THESE CASES IN FAVOR OF THE GOVERNMENT FOR FISCAL YEAR 1990

Petitioners ask the Court to overlook Article III and the separation of powers by finding that section 318(b)(6)(A) merely repealed the laws at issue in these cases and did not dictate how the courts should apply these laws. *See* Pet. Br. at 20-31. Petitioners, however, ignore what Congress actually did, as well as what it chose not to do, in Section 318.

A. Section 318(b)(6)(A) Attempts To Determine The Application Of The Existing Laws By Directing The Courts To Decide These Cases For The Government

Section 318(b)(6)(A) sets forth its effect on these cases during fiscal year 1990 in unambiguous terms:

> Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al. v. F. Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc. et al. v. F. Dale Robertson*, Civil No. 89-99 (order granting preliminary injunction) and the case *Portland Audubon Society et al. v. Manual Lujan, Jr.*, Civil No. 87-1160-FR.

Pet. Br. App. 5a-6a. The plain meaning of this language is that, for fiscal year 1990, Congress "directs" the courts to conclude that Forest Service and BLM actions which meet the guidelines of subsections (b)(3) and (b)(5) also "meet[ ]" the requirements of the existing laws at issue in these cases – that such actions are "adequate consideration for the purpose of meeting the statutory requirements that are the basis for" the claims in these cases.[27]

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[27] It would do more than strain the plain meaning of the phrase "meet[ ] the statutory requirements" in (b)(6)(A) to conclude that this language actually says "repeal the statutory requirements" – it would re-write the law altogether. "[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of . . . judicially rewriting it." *Heckler v. Mathews*, 465 U.S. 728, 741-42 (1984); *see Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) ("this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction . . . free from constitutional defects"). In plain language, to "meet" a

The specific reference in subsection (b)(6)(A) to the "order granting preliminary injunction" in the *Seattle Audubon Society v. Robertson* case explicitly shows that Congress was directing the subsection at the courts, not some other branch of government.[28] In this way Congress sought to control the disposition of these particular cases for fiscal year 1990.

The disclaimer that precedes these instructions to the courts confirms both that Congress did not seek to control the disposition of these cases *after* fiscal year 1990 and that it *did* intend to control the outcome of these cases *during* the fiscal year. The Conference Report on the section makes this point explicit:

> The legal adequacy of and the prohibition against judicial review of the SOHA framework established in this section should not be construed to moot *future action after fiscal year 1990* in the *Seattle Audubon Society/Washington Contract Loggers Association v. Robertson* cases . . . .

Br. Opp., App. at 120a (emphasis added).

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requirement is to accept it and comply, not to reject it or set it aside in favor of some other standard. The plain language of subsection (b)(6)(A) speaks of "meeting . . . statutory requirements."

[28] Petitioners suggest that Congress' use of the word "direct" in subsection (b)(6)(A) is aimed at the Forest Service and BLM, Pet. Br. at 30. The legislative history of Section 318 directly refutes this suggestion. It provides, "[t]his section in no way alters application of the Endangered Species Act or other environmental laws to Forest Service and BLM management activities." Br. Opp., App at 122a. Moreover, only "direction" to the courts could control the outcome of these cases for a year since the courts actively were considering what agency actions would meet the requirements of the existing environmental laws.

The last sentence of subsection (b)(6)(A) also shows that Congress' instruction to the courts in the *first* sentence of the subsection attempts to control the outcome of these cases for a year. This sentence says: "The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." By its own terms, this sentence removes from judicial review *only* a statute – sections 318(b)(3) and (b)(5) – and not agency actions. These statutory provisions do no more than place certain areas of the national forests and BLM lands off-limits to logging during fiscal year 1990. *See* Pet. App. at 3a-5a. The last sentence of subsection (b)(6)(A) does *nothing* to alter the underlying environmental statutes in these cases or to alter the underlying statute authorizing judicial review of Forest Service and BLM activities (the APA). In short, the last sentence of subsection (b)(6)(A) shows that Congress did not alter the generally applicable environmental and judicial review statutes involved in these cases.[29]

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[29] Petitioners attempt to argue that the last sentence of subsection (b)(6)(A) somehow precludes judicial review of plaintiffs' claims under the existing laws against Forest Service and BLM actions. Petitioners thus assert that the court of appeals failed to heed the last sentence of subsection (b)(6)(A) and found that federal agency actions taken to follow the statutory guidelines "may be rejected [ ] *because the guidelines . . . are not sufficient to comply with other statutes.*" Pet. Br. at 23 (emphasis added). But petitioners confuse judicial review of *agency actions* with the limited review courts might perform of a *statute*, such as the subsection (b)(3) and (b)(5) guidelines. The court of appeals did not make this mistake. Courts do not review a federal statute to decide whether it complies with another statute. Courts do, however, review agency actions to decide whether they comply with whatever statutory standards are applicable. 5 U.S.C. §§ 702, 706 (APA review of agency

As the court of appeals correctly concluded, the plain language of the first sentence of subsection (b)(6)(A) – the only language that affects the disposition of these cases during fiscal 1990 – "directs the court to reach a specific result" in these cases for the year. Pet. App. 14a.

B. Section 318 Does Not Repeal Or Replace The Laws That Form The Bases Of The Claims In These Cases.

Petitioners attempt to avoid the separation of powers concerns that Section 318 raises by arguing that the section provides a "temporary modification of statutory requirements," rather than directing the courts how to resolve these cases. Pet. Br. at 20. Petitioners, however, completely ignore this Court's well-established rules for analyzing whether one statute "modifies" another. Applying these rules demonstrates that petitioners are wrong.[30]

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actions). The court of appeals simply concluded that nothing in the section 318 guidelines (other than Congress' determination that compliance with (b)(3) and (b)(5) would be "adequate consideration") barred the courts from deciding whether Forest Service and BLM actions during fiscal year 1990 complied with the requirements of the existing laws. Pet. App. at 13a.

Since no one has ever asked the courts to review in any way, let alone invalidate, the subsection (b)(3) and (b)(5) guidelines themselves, or argued that the Forest Service did not need to comply with them, the court of appeals properly "expressed no opinion on the second and final sentence of subsection (b)(6)(A)," Pet. App. 17a & n. 4, which, by its terms, seeks to insulate only these *statutory* standards from judicial examination.

[30] Where, as here, the language of one statute regulates conduct that other statutes also regulate, this Court has long made clear that

> the courts are not at liberty to pick and choose among congressional enactments, and when two statutes are

Section 318 contains no express repeal of any existing laws that governed Forest Service and BLM timber sales during fiscal year 1990 – with or without the clause struck down by the court of appeals. Indeed, Congress explicitly confirmed in the conference report that Section 318 did not alter the application of the environmental laws to the Forest Service or BLM for fiscal year 1990, and

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> capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

Traynor v. Turnage, 485 U.S. 535, 548 (1988); *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490, 510 (1989); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The Court must first determine whether the new statute expressly repeals or modifies preexisting law; where, as here, there is no clear language of repeal in either the text or legislative history, there can be no express repeal. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984) (no express repeal where neither text nor legislative history discussed relation between statutes); *Blanchette v. Connecticut General Ins. Corp. (Regional Rail Reorganization Act Cases)*, 419 U.S. 102, 133 (1974) (same).

If there is no express repeal, the Court must determine whether there has been an implied repeal. However, here petitioners "encounter head-on the 'cardinal rule . . . that repeals by implication are not favored.' " *Morton, supra*, 417 U.S. at 549; *see Traynor v. Turnage, supra*, 485 U.S. at 547. This policy, moreover, applies "with even *greater* force when the claimed repeal rests solely on an Appropriations Act." *TVA v. Hill*, 437 U.S. 153, 190 (1978) (emphasis in original). An implied repeal exists only "when the earlier and later statutes are irreconcilable," *Morton*, 417 U.S. at 550. "When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest.' " *Id.*; *cf. Flint Ridge Devel. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976) (NEPA applies to all federal actions unless "a clear and unavoidable conflict in statutory authority exists," that creates "an irreconcilable and fundamental conflict" in agency obligations).

Congress failed to adopt an earlier version of Section 318 that would have repealed these existing laws. Moreover, the section does not conflict in any way with or otherwise "occupy the field" of Forest Service and BLM decision-making for a year.

1. Section 318 contains no express repeal or other amendment of the environmental laws in these cases.

The Court will search all eleven subsections of Section 318 in vain for any express repeal or amendment of the environmental laws at issue in these cases with respect to Forest Service and BLM timber sales in spotted owl habitat during fiscal year 1990. Indeed, the absence of express language of repeal anywhere in Section 318 for the laws at issue in these cases stands in stark contrast to the use of *explicit* language of repeal for other laws. *See* Pet. App. at 1a (section 318(a)(1)) (timber sales to be offered "notwithstanding the provisions of the Federal Timber Contract Payment Modification Act of 1984"); *id.* at 8a (section (d)) ("Notwithstanding any other provision of law, there shall be not more than one level of administrative appeal"); *id.* at 9a (section (f)(1)) (certain fiscal year 1989 timber sales "shall not be subject to further judicial review by any court of the United States"); *id.* at 10a-11a (section (g)(1)) (repealing authority of courts to grant certain interlocutory remedies, and providing that "[t]he provisions of section 705 of title 5, United States Code, shall not apply to any challenge to such a timber sale").[31] Congress clearly knew how to repeal the existing

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[31] Subsection (a), which sets timber sale targets for the Forest Service and BLM, does not expressly repeal any laws that

laws when it wanted to, and chose to do so only for laws *other than* the environmental laws at issue in these cases during fiscal year 1990.

2. Section 318's legislative history makes clear Congress did not repeal or amend the existing laws in these cases.

The legislative history of Section 318 resolves any remaining question about whether Section 318 was directed at the courts (which it was) or was intended to repeal the existing laws at issue in these cases (which it was not). The conference report on Section 318 states unequivocally that:

> This section in no way alters application of the Endangered Species Act or other environmental laws to Forest Service and BLM management activities.

Br. Opp., App. at 122a. Congress' revision of the Senate version of Section 318 to eliminate language that *would have* repealed the laws at issue in these cases also confirms that the final version does not do so.

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regulate the selection of particular timber sales to meet this target. *See Gifford Pinchot Alliance v. Butruille*, 742 F. Supp. 1077, 1083 (D.Or. 1990). Similarly, subsections (b)(1) through (5) contain only statutory guidelines for the Forest Service and BLM to follow in carrying out the administrative task of selecting and preparing timber sales during fiscal year 1990. These guidelines certainly state no express repeal of any requirement of other laws that also govern agency selection of timber sales. Subsections (c) and (e), respectively, establish advisory committees to comment on timber sale selection and confirm the requirements of inter-agency cooperation under the Endangered Species Act. Like subsections (a) and (b), none of these subsections expressly repeals the laws at issue in these cases.

The original Senate version of Section 318 would have authorized timber sales "prepared, advertised, awarded and operated" during fiscal year 1990 "notwithstanding any provision of law that is the basis for any stay, restraining order or injunction issued in" these cases. *See* App. A at 6a. However, the strong opposition in the House of Representatives to these provisions in the Senate version of Section 318, *see* App. B, led the conference committee to rewrite the Senate's efforts to repeal the laws for these cases. Rather than barring challenges to fiscal year 1990 timber sales "notwithstanding any provision of law" raised in these cases, section 318(b)(6)(A) instructed the courts that Forest Service and BLM conduct "is adequate consideration for the purpose of meeting" those statutes.

Petitioners' contention that the final language of section 318(b)(6)(A) should be read to repeal the environmental laws, Pet. Br. at 20-22, the same outcome as the Senate language that Congress failed to adopt, cannot stand. As this Court has explained:

> Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.

INS v. Cardoza Fonseca, 480 U.S. 421, 442-43 (1987). *Accord, e.g., North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 528-29 (1982) (adoption of one version of competing language in conference committee indicates that it "prevailed for substantive reasons"); *Gulf Oil Corp. v. Copp Paving Co. Inc.*, 419 U.S. 186, 199-200 (1974) (deletion of a provision by a conference committee "militates against a judgment that Congress intended a result that it expressly declined to enact").

3. Section 318 does not occupy the field of Forest Service and BLM decisionmaking for fiscal year 1990.

Despite the absence of any specific language of repeal or amendment of the existing laws in Section 318, and despite the unequivocal evidence from the history of Section 318 that Congress did not intend to repeal or amend these laws, petitioners maintain that Congress "intended that Section 318's standards would preempt the field as to 1990 sales . . . . " Pet. Br. at 22. Petitioners, moreover, argue that an implied intent to amend or repeal existing laws can be found "without regard to the first sentence" of subsection (b)(6)(A). *Id.* at 20. Petitioners attempt no principled analysis to establish this point and they are wrong.[32] The provisions of Section 318 – other than subsection (b)(6)(A) – simply add temporary substantive and procedural guidelines for selecting timber sales during fiscal year 1990. These provisions complement, but do not supplant or conflict with, the requirements of the existing laws in these cases.

First, the government itself interpreted the timber sale targets of section 318(a) (providing that the Forest Service and BLM "shall offer" specified timber sale levels) as requiring consistency with other applicable laws. Far from supplanting or repealing those laws, section 318(a) simply set a timber sale "mark" or target that the Forest Service and BLM were to attempt to achieve while also meeting other applicable legal requirements. *See Gifford Pinchot Alliance v. Butruille*, 742 F.Supp. 1077, 1083 (D.Or. 1990) (upholding Forest Service position that

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[32] *See supra* note 30 (discussing framework for analyzing effects of one statute on another).

Section 318(a)'s timber targets did not require agency to disregard other environmental laws in offering fiscal year 1990 timber sales); *Gifford Pinchot Alliance v. Butruille*, 752 F.Supp. 967 (D. Or. 1990) (same conclusion following the Forest Service's actual failure to offer Section 318(a)'s target volume).

Similarly, nothing in subsections 318(b)(1) through (b)(5) conflicts with or eliminates agency discretion under the existing environmental laws. Instead, subsection (b)(3) places certain areas of the national forests off-limits to logging during fiscal year 1990.[33] Placing these areas off-limits, however, neither occupies the regulatory field generally nor creates a necessary conflict with existing laws and regulations that govern all Forest Service lands. The other guidelines of subsection (b) also do not occupy the field or conflict with the existing laws. These guidelines provide standards for protecting ecologically significant old growth forests *in addition to* the requirements of the existing laws to protect wildlife populations, water quality, and other environmental values. The Forest Service still must exercise its discretion under the existing laws and regulations – along with the complementary guidelines of subsection (b) – in selecting and preparing timber sales from areas of national forests other than those set aside by (b)(3) and (b)(5).

The NFMA and its regulations thus still require the Forest Service to "provide for diversity of wildlife species . . . . ," 16 U.S.C. § 1604(g)(3)(B), and to "maintain viable populations of native vertebrate species," 36 C.F.R. § 219.19. In order to meet this requirement, the Forest Service still must decide which combination of timber sales to select and prepare, outside the areas placed off-limits by section

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[33] *See supra* at 16-17 (discussing subsection (b)(3) guidelines)

318(b)(3), so that these sales, together with the areas protected by (b)(3) and other laws, will provide for "diversity of wildlife species" and "viable populations" of these species both during and after fiscal year 1990. The same is true for the other existing environmental laws at issue in these cases. The BLM still must practice "multiple use" management under the requirements of FLPMA. And both the Forest Service and the BLM still must meet NEPA's procedural mandate to consider and disclose the environmental consequences – including the consequences for wildlife species such as the spotted owl – of those timber sales they choose to sell during fiscal year 1990.[34]

In short, none of the provisions of Section 318 poses even an arguable conflict – much less an "irreconcilable" one, *Morton v. Mancari*, 417 U.S. at 550 – with the requirements of existing law. Section 318 also does not "occupy the field," Pet. Br. at 22, regulated by these laws, even for a year. Instead, the provisions of Section 318 complement and coexist with the requirements of existing laws. *Morton v. Mancari*, 417 U.S. at 551.

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[34] Nothing in Section 318, except subsection (b)(6)(A), addresses the application of the existing laws at issue in these cases to the activities of the Forest Service and BLM during fiscal year 1990. Nor does any provision of Section 318, except subsection (b)(6)(A), prevent the plaintiffs from asking the courts to review and decide whether these agencies' actions during the fiscal year meet the requirements of the existing laws. Only subsection (b)(6)(A) addresses these issues and it does so by telling the courts how to interpret and apply the law in these cases.

To be sure, under Section 318, as the court of appeals ruled, Pet. App. at 13a, the Forest Service and BLM may have to take actions *in addition to*, but not at odds with, the actions they might choose to take to comply with the existing laws. But the provisions of Section 318 simply do not instruct the Forest Service, explicitly or by implication, to forego providing for diversity of wildlife, including spotted owls.

C. Section 318(b)(6)(A) Usurps The Courts' Adjudicative Role In These Cases.

Petitioners concede, as they must, that Article III protects the federal courts' ability to exercise "adjudicative functions" in deciding cases properly before them. Pet. Br. at 17. The plain language of section 318(b)(6)(A) instructs the courts to decide these cases in favor of the government for one year. It does this quite simply by directing the courts to treat Forest Service and BLM actions that comply with one law – the requirements of subsections 318(b)(3) and (b)(5) – as actions that also comply with the separate and distinct requirements of the other, equally applicable laws that form the bases of plaintiffs' claims.

Nonetheless, petitioners contend that the specific identification of these cases in the subsection is an inconsequential form of legislative shorthand for the underlying statutes. Pet. Br. at 25. Petitioners also label the subsection a "deeming provision," as if the label could disguise the function of the statute. *Id.* at 25-28. But no matter which way petitioners turn, the plain language of section 318(b)(6)(A) blocks the path.[35]

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[35] Throughout their arguments, petitioners also refer to the "cardinal principle" that the courts should strive to construe statutes to avoid constitutional difficulties, as though this guide to statutory construction could empower the courts to redraft subsection (b)(6)(A) to avoid trouble. Of course, where, as here, the statute is clear, there is no saving construction available. To rescue subsection (b)(6)(A), the courts would need to write a different statute for Congress. The courts cannot do this. *See Heckler v. Mathews*, 465 U.S. at 741-42; *Aptheker v. Sec. of State*, 378 U.S. at 515.

1. The reference to these cases in subsection (b)(6)(A) is not simply a convenient shorthand.

Petitioners argue that "[t]he naming of the cases in the statute, although perhaps unusual, is . . . not materially different from enumerating the statutes themselves." Pet. Br. at 25. Not so. The identification of these cases in subsection (b)(6)(A) tells the courts which particular claims under NFMA, NEPA, the MBTA, and FLPMA – the ones in these cases – Congress was instructing the courts to resolve for fiscal year 1990. Congress simply did not address NFMA, NEPA, FLPMA and the MBTA generally in Section 318. Rather it took aim at the claims under these statutes in these cases. As the court of appeals correctly concluded, "[b]y section 318, Congress for the first time endeavors to instruct federal courts to reach a particular result in pending cases identified by caption and file number." Pet. at 9a.

2. Labelling subsection (b)(6)(A) a "deeming provision" does not change the operation of the statute.

Petitioners make a great deal of their designation of subsection (b)(6)(A) as a "deeming provision." Pet. Br. at 25-28, 37-38. But a statute in which Congress includes a "deeming provision" or a "species . . . of irrebuttable presumption," must be analyzed like any other statute to determine its operation and effect. Indeed, if labelling a statute a "deeming provision" ended the separation of powers inquiry, *United States v. Klein* would have been decided differently – the appropriations amendment at issue in that case was itself a "deeming" statute. *See Klein*, 80 U.S. (13 Wall.) at 143 (describing statute). If a "deeming" statute – or any other statute – violates the Constitution, it must be set aside; the label attached to the statute is not important.

In any event, the thirty-five "deeming" statutes petitioners cite in support of their "deeming" argument are not before the Court, and they are distinguishable from section 318(b)(6)(A) in several important respects. None of them specifies pending litigation or existing court orders, as subsection (b)(6)(A) does. None specifies that certain administrative actions "meet" the requirements of existing laws, as subsection (b)(6)(A) does. The legislative history of none of these provisions specifically disavows any intent to modify existing laws, as the legislative history for subsection (b)(6)(A) does.[36]

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[36] Even a cursory review of the statutory "deeming" provisions that petitioners catalogue reveals that many are inconsequential definitional provisions of a prospective and general nature which determine that certain categories of things should be governed by certain provisions of law. *See* Pub. L. No. 92-318, § 506(m), 86 Stat. 352 (1972) (requirements of state consent laws); Pub. L. No. 99-662, § 204, 100 Stat. 4099 (1986) (requirements of permits); Pub. L. No. 102-624, § 1736, 104 Stat. 3793 (1990) (signature requirements). Others are allocational housekeeping provisions providing that certain expenditures are deemed to be made under certain laws or budgetary provisions, or that certain officers are deemed to work for certain departments. *See* Pub. L. No. 89-554, § 1, 80 Stat. 425 (1966) (departmental location of officers); Pub. L. No. 98-473, 98 Stat. 1954 (1984) (budgeting allocation); Pub. L. No. 100-440, § 631, 102 Stat. 1759 (1988) (hospital discharges). None of these technical provisions affects the courts' ability to adjudicate particular cases or specific pending claims under existing laws, as subsection (b)(6)(A) does.

Twenty-nine of the thirty-five deeming provisions petitioners cite are from legislation adding lands to the National Wilderness Preservation System under the Wilderness Act, 16 U.S.C. § 1131 *et seq.* The constitutionality of these statutes, of course, is not at issue here. Moreover, these statutes address a fundamentally different situation than subsection (b)(6)(A).

Moreover, the mere fact that Congress may have followed a particular legislative path on many occasions before is not proof that the path complies with the Constitution. *See INS v. Chadha*, 462 U.S. at 945-46. Thus, even if petitioners' extensive catalogue of "deeming" provisions included some statutes that violate the separation of powers, a catalogue of other statutes does not make subsection (b)(6)(A) constitutional. A "deeming provision" that directs the courts how to decide a particular case under the existing laws, even temporarily, usurps the courts' power to decide the case, regardless of the provision's label. Such a provision is not substantively different from a statute in which Congress "deems" that the courts shall reject the plaintiffs' claims, or rule in the

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In the Wilderness Act amendments Congress accepts certain Forest Service documents as "adequate consideration of the suitability of such lands for inclusion" in the Wilderness system. *E.g.*, Pub. L. No. 101-401, § 2(b)(2), 104 Stat. 863, 846 (1990) (Maine wilderness); Pub. L. No. 96-560, § 107(b)(2), 94 Stat. 3265, 3270 (1980) (Colorado wilderness). These amendments, unlike section 318(b)(6)(A), do not identify specific pending cases. The legislative history of these amendments also does not contain any congressional disavowal of intent to modify existing law, as does section 318(b)(6)(A). Finally, the ultimate decision on wilderness designation rests with Congress, *not* the Forest Service. Congress can plainly state when it believes the Forest Service has performed an "adequate consideration" for Congress' purposes in reaching wilderness decisions. In contrast, the existing environmental laws require the Forest Service and BLM to comply with statutory requirements subject to judicial review. Section 318's "determin[ation] and direct[ion]" that Forest Service conduct "is adequate consideration for the purpose of meeting the statutory requirements" governing that action intrudes directly into the *judicial* – not the legislative – function.

government's favor, in a particular pending case.[37] In both situations, the courts are precluded from "giving the effect to evidence which, in [their] own judgment, such evidence should have, and [are] directed to give it" a different effect. *Klein*, 80 U.S. (13 Wall.) at 147.

3. Congress through Section 318(b)(6)(A) took the expedient course of simply deciding these cases for the courts during fiscal year 1990.

The central issue in this case is the effect of subsection (b)(6)(A) – regardless of its label – on the courts and their ability to apply existing laws to the facts presented in plaintiffs' cases. The plain language of the subsection tells the courts how to interpret and apply the existing, unrepealed and unamended environmental laws to plaintiffs' claims, regardless of how the courts might otherwise interpret and apply those laws, and regardless of the fact that the defendant federal agencies have engaged in and will continue to engage in the conduct challenged in the cases and regulated under the laws. As the court of appeals ruled, subsection (b)(6)(A) – "does not establish new law, but directs the courts to reach a specific result

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[37] Petitioners' hypothetical reformulations of section (b)(6)(A), Pet. Br. at 28 n. 20, are singularly unhelpful. As explained in the text, Congress' rejection of particular language ("notwithstanding any other provision of law") belies petitioners' contention that the court of appeals' analysis of the language actually adopted by Congress was "artificial." *Id.* Moreover, any other "hypothetical examples," *id.*, would properly be analyzed in the same fashion as section (b)(6)(A): Does the statute attempt to tell courts how to apply existing law in a particular case? If so, it violates the Constitution just as section (b)(6)(A) does.

and make certain factual findings under existing law in connection with two cases pending in federal courts." Pet. App. at 14a. This is indeed what "*Klein* and subsequent cases agree is constitutionally proscribed." *Id.*[38]

Any other conclusion would allow Congress to accomplish through indirect means (which usurp the powers of another branch of government) what for political reasons it chose not to accomplish through a general repeal or amendment of the existing laws. Indeed, here, Congress was unwilling to attempt even a limited repeal of the laws: it discarded a Senate version of Section 318 with limited but explicit language of repeal following strong protests from other members of Congress to such legislation. *See supra* at 13-15. Rather than face squarely a potentially difficult political controversy, Congress took a detour across the powers of the courts.

As this Court observed in *INS v. Chadha*, Congress' approach in section 318(b)(6)(A) "doubtless [was] in many respects a convenient shortcut." 462 U.S. at 958. Nonetheless,

> There is no support in the Constitution or decisions of this Court for the proposition that the

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[38] Petitioners argue that striking subsection (b)(6)(A) from Section 318 because it violates the separation of powers "distorts the congressional compromise" in Section 318. Pet. Br. at 31-33. Allowing the statute to stand, however, as a legislative exercise of judicial power to decide a particular case would distort the fundamental political compromise embodied in the Constitution – the allocation of separate powers to separate branches of government. A temporary political expedient – section 318(b)(6)(A) – to avoid a confrontation over the repeal or amendment of existing laws is no excuse for ignoring the Constitution. Whenever Congress acts contrary to constitutional standards, as it has here, the courts must inevitably "distort" a congressional compromise.

> cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided . . . .

Id. at 959 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). Congress cannot constitutionally adjudicate particular cases, even if (*particularly* if) changing the law would be politically difficult. Section 318(b)(6)(A) is an exercise of the "judicial Power" reserved to the courts in Article III of the Constitution and, as such, is unconstitutional.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals in these cases that section 318(b)(6)(A) violates the constitutional separation of powers should be affirmed.

Respectfully submitted,

VICTOR M. SHER
TODD D. TRUE*
SIERRA CLUB LEGAL DEFENSE FUND
216 First Avenue South
Suite 330
Seattle, Washington 98104
(206) 343-7340

Attorneys for Plaintiffs Seattle Audubon Society, et al.

JOHN BONINE
MICHAEL AXLINE
University of Oregon
School of Law
1101 Kincaid Street
Room 329
Eugene, Oregon 97403
(503) 346-3823

Attorneys for Plaintiffs Oregon Natural Resources Council and Lane County Audubon Society

*Counsel of Record

APPENDICES TO BRIEF OF RESPONDENTS SEATTLE AUDUBON SOCIETY, ET AL.

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APPENDIX A

Vol. 135 No.102
WASHINGTON, WEDNESDAY, JULY 26, 1989
CONGRESSIONAL RECORD
PROCEEDINGS AND DEBATES
OF THE 101st CONGRESS, FIRST SESSION

* * *

S 8775-76 CONGRESSIONAL RECORD –
SENATE July 26, 1989

SEC. 317. (a) From funds appropriated under this Act or otherwise made available –

(1) the Forest Service shall award, notwithstanding the provisions of the Federal Timber Contract Payment Modification Act of 1984 (16 U.S.C. 618 (a)(5)(C)), an aggregate timber sale level of 8 billion board feet of net merchantable timber from the national forests in Oregon and Washington for fiscal years 1989 and 1990. Such timber sales shall be consistent with legally valid land and resource management plans except, in the case of the Mapleton Ranger District of the Siuslaw National Forest, Oregon, shall be consistent with the preferred alternative of the draft land and resource management plan and accompanying draft environmental impact statement dated October 1, 1986: Provided, That of the 8 billion board foot aggregate timber sale level for fiscal years 1989 and 1990, timber sales awarded from the thirteen national forests in Oregon and Washington known to contain northern spotted owls shall meet an aggregate timber sale level for fiscal years 1989 and 1990 of 6 billion board feet of net merchantable timber; and

(2) the Bureau of Land Management shall award such volumes as are required in fiscal year 1990 to meet an aggregate timber sale level of 2 billion board feet for fiscal years 1989 and 1990 from its administrative districts in Western Oregon.

(b)(1) In accordance with subsection (b)(2) of this section, all timber sales from the thirteen national forests in Oregon and Washington known to contain northern spotted owls prepared pursuant to this section shall minimize fragmentation of the most potentially significant forest stands. "Potentially significant forest stands" are defined as meeting all the following criteria:

(A) that have at least eight trees per acre exceeding 300 years in age or 40 inches in diameter;

(B) that contain more than four snags per acre greater than 15 feet tall and greater than 24 inches in diameter; and

(C) that contain more than four downed trees per acre which are greater than 24 inches in diameter and are greater than 50 feet long.

(2) To the extent any fragmentation is necessary in order to meet the timber sale levels directed by subsections (a)(1) and (a)(2) of this section, the Forest Service and the Bureau of Land Management shall confine such fragmentation to the potentially significant forest stands which have been prioritized from the smallest to the largest on a forest-by-forest and district-by-district basis.

(3) The Forest Service is directed to thoroughly review the relationship between the minimal fragmentation criteria of subsections (b)(1) and (b)(2) of this section and the timber sales program for the Mr. Baker-Snoqualmie and Olympic

National Forests. If these forests are unable to meet their proportional share of the allowable sale quantity under the minimal fragmentation criteria, then the Forest Service shall consult with the advisory boards established under subsection (c) of this section and the U.S. Fish and Wildlife Service as established under subsection (e) of this section to identify timber sales to meet the proportional allowable sale quantity, and shall prepare, advertise, offer and award these identified sales. Nothing in this subsection shall be deemed to alter the relationship between the Forest Service and the United States Fish and Wildlife Service under the conferencing process established under section 7(a)(4) of the Endangered Species Act of 1973 (16 U.S.C. 1536(a)(4), as amended).

(c) The Secretaries of the Interior and Agriculture shall name advisory boards on a forest-by-forest and district-by-district basis which shall be comprised of not more than thirteen individuals who, in the appropriate Secretary's judgement, equally represent a diversity of views. The advisory boards shall be named not later than November 1, 1989. The advisory boards shall assist the Forest Service and Bureau of Land Management in reviewing prospective timber sales which shall meet the timber sale levels directed by this section prior to their award. The members of the advisory boards authorized by this section shall serve without compensation or reimbursement of expenses.

(d) Notwithstanding any other provision of law, there shall be not more than one level of administrative appeal of any decision by the Forest Service and the Bureau of Land Management to undertake any activity directed by this section for timber sales to be prepared, advertised, offered, and awarded during fiscal year 1990 from the thirteen national forests in Oregon and Washington and public lands in western Oregon

known to contain northern spotted owls. If an administrative stay is granted in any such appeal the Regional Forester or the Bureau of Land Management State Director shall issue a final decision on the merits within forty five days of the date of issuance of such stay.

(e) The United States Fish and Wildlife Service shall confer with the Forest Service and the Bureau of Land Management, and shall prepare and complete an advisory report which recommends to the Forest Service and the Bureau of Land Management criteria necessary to maintain the viability of the northern spotted owl. The Forest Service and Bureau of Land Management shall use, in their discretion, such of the criteria as they respectively deem appropriate in the preparation of timber sales on the thirteen national forests in Oregon and Washington known to contain northern spotted owls and public lands in western Oregon, respectively, during fiscal year 1990. Such report shall be completed and submitted to the Forest Service and Bureau of Land Management by November 1, 1989. The Forest Service and the Bureau of Land Management shall use this report, together with other relevant information, in the preparation, advertisement, offer, and award of the timber sales directed by this section.

(f)(1) If all parties to the lawsuits referenced in subsection (g)(1) of this section reach and enter into agreements accepted by the relevant courts not later than October 1, 1989, which allows the preparation, advertisement, offer, and award of at least 1 billion board feet of net merchantable timber from those timber sales enjoined on the national forests, and at least 250 million board feet of timber sales on Bureau of Land Management districts in western Oregon enjoined by the orders identified in subsection (g) (1) of this section, then such timber sales selected shall be prepared, offered, awarded and

operated and shall not be subject to further judicial review by any court of the United States.

(2) If the agreements specified in subsection (f)(1) of this section is reached, then those timber sales listed in the court orders referenced in subsection (g)(1) of this section but not identified in the agreement in subsection (f)(1) of this section are hereby voided and shall not be offered for resale in fiscal year 1990.

(g)(1) In accordance with the provisions of subsections (b)(1), (b)(2), (b)(3), and (e) of this section, the Forest Service and Bureau of Land Management for fiscal year 1990 shall identify timber sales for preparation, advertisement, offer and award, which may include timber sales from among those listed in the court order dated March 24, 1989, as amended, in the captioned case Seattle Audubon Society et al., v. F. Dale Robertson, Civil Number 89-160, consolidated with Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil Number 89-99 (order granting preliminary injunction); the opinion entered on May 18, 1989 in Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil Number 87-1160-FR (order granting preliminary injunction), and shall consult with the parties of the aforementioned cases in identifying timber sales which were released so that the timber sale levels directed in subsections (a)(1) and (a)(2) of this section can be attained.

(2) After they are established, the Forest Service and Bureau of Land Management shall consider the recommendations of the advisory boards established pursuant to subsection (c) of this section regarding any timber sale to be awarded in fiscal year 1990 prior to the award of any subsequent timber sale. These recommendations shall be considered regardless of whether the agreements provided in subsection (f)(1) of this

section have been reached, entered into, and accepted by the relevant courts.

(h)(1) If all parties to the lawsuits referenced in subsection (g)(1) of this section fail to reach and enter agreements as provided in subsection (f)(1) of this section, then such timber sales selected pursuant to subsections (g)(1) and (g)(2) of this section shall be prepared, advertised, awarded and operated notwithstanding any provision of law that is a basis for any stay, restraining order or injunction issued in a proceeding identified in subsection (g)(1) of this section.

(2) The Forest Service and Bureau of Land Management shall, for each respective timber sale, lift its own stay or apply to the appropriate court for the lifting of the restraining order or injunction whose basis has been withdrawn by this section.

(i) No restraining order, injunction, or void of sale shall be issued by any court of the United States in fiscal year 1990 with respect to any decision to prepare, advertise, offer and award timber sales from the thirteen national forests in Oregon and Washington and public lands in western Oregon known to contain northern spotted owls. The provisions of section 705 of title 5, United States Code shall not apply to any challenge to such a timber sale.

(j) The Forest Service, the Bureau of Land Management, and the United States Fish and Wildlife Service shall submit reports updating their findings and progress as determined by the process established in subsection (e) of this section on a monthly basis to the President of the Senate and the Speaker of the House for appropriate referral. Such reports shall be submitted as directed beginning on December 1, 1989, and ending on September 30, 1990.

(k) This section applies solely to the thirteen national forests in Region Six and Bureau of Land Management districts in western Oregon known to contain northern spotted owls. Nothing contained in this section shall be construed to require the Forest Service or Bureau of Land Management to develop similar policies on any other forest or district in Oregon and Washington.

(l) The advisory committees established under this section shall not be subject to the Federal Advisory Committee Act (86 Stat. 770).

(m) The provisions of this section shall remain in effect until September 30, 1990.

APPENDIX B

Congress of the United States

House of Representatives

Washington, DC 20515

September 11, 1989

The Honorable Sidney R. Yates
Chairman
House Committee on Appropriations
Subcommittee on Interior and Related Agencies
Washington, D.C. 20515

Dear Chairman Yates:

In just a few days, members of the conference committee on the Interior Appropriations Bill for FY 1990 will face very important decisions regarding the future of our nation's forests. We, the undersigned Members of the House of Representatives, are deeply concerned about provisions of the bill which the Senate included regarding judicial review and the management of ancient forests. We believe that the language of the Interior Appropriations Bill as passed by the House on July 12 is a more reasonable approach to these matters, and that this language should be maintained during conference committee action.

The objectionable Senate provisions, collectively known as the Hatfield/Adams provision, effectively insulate the Forest Service and the Bureau of Land Management from judicial remedies imposed under the Endangered Species Act, the National Forest Management Act, the National Environmental Policy Act, the Clean Water Act and any other federal law. This insulation is contrary to our concept of justice because it will

limit the ability of citizens to obtain judicial remedies to illegal agency activities.

The Hatfield/Adams amendment threatens to remove administrative decisions – no matter how illegal – from effective judicial remedies. In addition, this insulation of agency activities has not been subject to the scrutiny of the authorizing committees with appropriate jurisdiction over the management of our nation's forest and wildlife resources.

Finally, we are concerned because the provision mandates an unsustainably high timber sales target, which will undercut all of the ancient forest protection measures attempted in the bill. Even regional Forest Service officials readily admit that this high volume cannot be maintained without violation of sustained yield forestry principles and Fish and Wildlife Service criteria to protect the spotted owl.

We therefore urge the conference committee to retain the relevant forestry sections of the House version of the Interior Appropriations Bill during its upcoming deliberations on this bill.

Sincerely,

/s/ _____

Jim Bates
Howard L. Berman
James H. Bilbray
Sherwood L. Boehlert
David E. Bonior
Robert A. Borski
Rick Boucher
Barbara Boxer
George E. Brown
John Bryant
Benjamin L. Cardin
Thomas R. Carper

William Clay
John Conyers Jr.
Jim Cooper
George W. Crockett
Robert W. Davis
Ronald V. Dellums
Thomas J. Downey
Richard J. Durbin
Roy Dyson
Don Edwards
Eliot L. Engel
Mike Espy
Dante B. Fascell
Edward F. Feighan
Barney Frank
Sam Gejdenson
Dan Glickman
Porter Goss
Tony P. Hall
Augustus F. Hawkins
Charles A. Hayes
Peter Hoagland
George Hochbrueckner
William J. Hughes
Andrew Jacobs Jr.
Tim Johnson
Harry Johnston
Jim Jontz
Marcy Kaptur
Robert Kastenmeier
Dale E. Kildee
Gerald D. Kleczka
Peter H. Kostmayer
Tom Lantos
Jim Leach
Sander Levin
Mel Levine
John Lewis
Jill Long
Edward J. Markey
Matthew G. Martinez
Frank McCloskey
Thomas McMillen
Kweisi Mfume
George Miller
Jim Moody
Constance Morella
Bruce A. Morrison
Robert J. Mrazek
Dave Nagle
Bill Nelson
Major Owens
Wayne Owens
Frank Pallone
Donald J. Pease
Nancy Pelosi
Timothy J. Penny
John E. Porter
Arthur Ravenal
Robert A. Roe
Edward R. Roybal
Patricia Saiki
Thomas C. Sawyer
Jim Saxton
James H. Scheuer
Claudine Schneider
Patricia Schroeder
Charles Schumer
Christopher Shays
Gerry Sikorski
David E. Skaggs
Jim Slattery

Louise M. Slaughter
Peter Smith
Robert C. Smith
Lawrence J. Smith
Stephen Solarz
Fortney Stark
Michael D. Synar
Robin Tallon
Esteban Torres
Edolphus Towns
Bob Traxler
Bruce F. Vento
Peter J. Visclosky
Doug Walgren
Ted Weiss
Alan Wheat
Robert E. Wise Jr.
Howard Wolpe

Supreme Court, U.S.
FILED
NOV 20 1991
OFFICE OF THE CLERK

No. 90-1596

In the Supreme Court of the United States

OCTOBER TERM, 1990

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

REPLY BRIEF OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, ET AL. IN SUPPORT OF PETITIONERS

MARK C. RUTZICK*
TIMOTHY J. SERCOMBE
Preston Thorgrimson Shidler Gates & Ellis
111 S.W. Fifth, Suite 3200
Portland, Oregon 97204
(503) 228-3200
Counsel for Northwest Forest Resource Council, et al.

* *Counsel of Record*

QUESTION PRESENTED

Whether Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 318, 103 Stat. 745 (1989), which mandates timber sales from particular federal lands, establishes interim guidelines for these sales, and establishes an exclusive judicial remedy for contesting the lawfulness of the mandated timber sales:

(1) Moots portions of respondents' claims in pending federal district court actions which seek declaratory and injunctive relief on planned timber sales; and,

(2) Violates the constitutional principle of separation of powers as applied to the adjudication of these claims.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, respondents Pilchuck Audubon Society, Washington Environmental Council, Washington Native Plant Society, Portland Audubon Society, Lane County Audubon Society, Oregon Natural Resources Council, and Siuslaw Task Force were plaintiffs in the district court (W.D. Wash.) and appellants in the court of appeals. National Audubon Society was a plaintiff in the district court (W.D. Wash.) and was not a party to the appeal. Respondents Washington Contract Loggers Association and William Pickell were plaintiffs in the district court (W.D. Wash.) and appellees in the court of appeals.

Respondents Portland Audubon Society, Headwaters, Lane County Audubon Society, Oregon Natural Resources Council, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Salem Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council were plaintiffs in the district court (D. Or.) and appellants in the court of appeals.

Respondents Northwest Forest Resource Council, Huffman & Wright Logging Co., Freres Lumber Co., Inc., Lone Rock Timber Co., Inc., Scott Timber Co., Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Inc., Douglas County Forest Products Company, Medford Corporation, Rogge Forest Products, Inc., Association of O & C Counties and Benton County were defendants-intervenors in the district court (D. Or.) and appellees in the court of appeals.

None of the parties has any parent, subsidiary or affiliated corporation except Lone Rock Timber Co., Inc., which is an affiliate of Sun Studs, Inc., and Scott Timber Co., which is an affiliate of Roseburg Forest Products Co.

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United States v. Mitchell,
109 U.S. 146 (1883) 8

United States v. Will,
449 U.S. 200 (1980) 8

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National Environmental Policy Act,
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National Forest Management Act,
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Legislative History:

135 Cong. Rec. H6505 (daily ed. Oct. 3, 1989) 13

135 Cong. Rec. H6506 (daily ed. Oct. 3, 1989) 12

135 Cong. Rec. H6507 (daily ed. Oct. 3, 1989) 15

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135 Cong. Rec. H6509-10 (daily ed. Oct. 3, 1989) 13

135 Cong. Rec. H6531-32 (daily ed. Oct. 3, 1989) 13

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135 Cong. Rec. S12962 (daily ed. Oct. 7, 1989). 14

135 Cong. Rec. S12979 (daily ed. Oct. 7, 1989). 13

H.R. Conf. Rep. No. 264, 101st Cong.,
1st Sess. (1989) 2, 14, 17

In the Supreme Court of the United States

OCTOBER TERM, 1990

NO. 90-1596

F. DALE ROBERTSON, ETC., ET AL., PETITIONERS,

v.

SEATTLE AUDUBON SOCIETY, ET AL.

REPLY BRIEF OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, ET AL. IN SUPPORT OF PETITIONERS

I. SECTIONS 318(b)(3) AND (b)(5) MOOTED THESE CASES FOR FISCAL YEAR 1990 BY REPLACING THE CHALLENGED AGENCY PLANS WITH NEW STATUTORY STANDARDS; SECTION (b)(6)(A) BARS ANTICIPATED CASES CHALLENGING FISCAL YEAR 1990 TIMBER SALES IMPLEMENTING THE NEW STATUTORY STANDARDS.

The separation of powers argument advanced by respondents Seattle Audubon Society ("SAS"), et al., rests on a fundamental misreading of Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 103 Stat. 745 (1989) (hereafter "Section 318"): subsection (b)(6)(A) -- the subject of the decision under review -- ***does not apply directly to these two cases***. Rather, subsections (b)(3) and (b)(5) are the provisions which resolve these two

cases for fiscal year 1990. Subsection (b)(6)(A) was intended to address prospective cases which Congress anticipated would be filed during fiscal year 1990 after the law was passed.

Seattle Audubon Society v. Robertson, No. 89-160WD (W.D. Wash.), challenged the Forest Service spotted owl management plan set forth in the Record of Decision issued by the Chief of the Forest Service on December 8, 1988. Petition for Writ of Certiorari Appendix ("Pet. App.") 6a, 30a. In Section 318(b)(3), Congress chose "to substitute adjusted interim standards for Spotted Owl Habitat Areas for national forest lands in lieu of the spotted owl management Record of Decision (ROD) published in 1988." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 88 (1989) (Conference Report on Section 318). The enactment of these new statutory standards in place of the agency action challenged in *Seattle Audubon Society* rendered the claims in that case moot during fiscal year 1990. Brief of Respondents Northwest Forest Resource Council, et al. in Support of Petitioners at 28-32. SAS never challenged this argument in its Brief.

Similarly, *Portland Audubon Society v. Lujan*, No. 87-1160-FR (D. Or.), challenged the BLM's existing spotted owl management plan. Subsection (b)(5) moots this case for fiscal year 1990 by substituting an expanded spotted owl network for the existing BLM plan.[1]

Section (b)(6)(A) does not deal at all with the *agency plans* challenged in *Seattle Audubon Society* and *Portland Audubon*

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[1] The Conference Report's statement that the (b)(5) plan "is deemed adequate" under the laws raised in *Portland Audubon Society* provides direct support for the petitioners' argument that Section 318(b)(6)(A) falls within the category of "deeming" statutes commonly enacted by Congress. H.R. Conf. Rep. No. 264 at 88; Petitioners' Brief at 25-29.

Society. Rather, it provides legal protection to "management of areas according to subsections (b)(3) and (b)(5) of this section."

Subsection (b)(6)(A) reflects Congress' anticipation that the relentless onslaught of litigation which had produced the "desperate timber supply crisis in Washington and Oregon," 135 Cong. Rec. S12961 (daily ed. Oct. 7, 1989) (remarks of Sen. Adams), that led to Section 318 would continue during fiscal year 1990. To avoid a repeat of this litigation-induced crisis, subsection (b)(6)(A) bars anticipated new cases during fiscal year 1990 by deeming the (b)(3) and (b)(5) guidelines -- not the prior agency plans -- legally adequate under the environmental laws invoked in *Seattle Audubon Society* and *Portland Audubon Society* and, in the second sentence, by barring judicial review of the guidelines.

Since subsection (b)(6)(A) does not apply to the claims asserted in these two pending cases, there can be no separation of powers violation. The Ninth Circuit was plainly wrong in finding subsection (b)(6)(A) unconstitutional when it does not apply to the two cases in question.

Immediately following the Ninth Circuit's ruling, SAS filed individual motions challenging 16 timber sales scheduled to be sold in the waning days of fiscal year 1990. These motions were filed by SAS without amending the complaint challenging the superseded Forest Service plan. These motions specifically challenged the "management of areas according to subsection (b)(3) . . . of this section" as violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*, the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600, *et seq.*, and the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§ 703, *et seq.*, "the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al. v. F. Dale Robertson . . ."

The first sentence of subsection (b)(6)(A) explicitly bars those challenges. The second sentence of subsection (b)(6)(A) precludes judicial review of those sales. *See post* at 4-7. Further, reversing the Ninth Circuit's constitutional ruling should eliminate the basis for the injunctions issued by the district court against these 16 sales.

II. THE SECOND SENTENCE OF SUBSECTION 318(b)(6)(A) BARS THE CHALLENGES TO THE 16 TIMBER SALES PERMITTED UNDER THE NINTH CIRCUIT'S RULING.

The Ninth Circuit refused to consider whether the second sentence of subsection (b)(6)(A) – prohibiting judicial review of the (b)(3) and (b)(5) guidelines -- barred SAS' efforts to challenge fiscal year 1990 timber sales, even though the decision below allowed them to file such challenges. Pet. App. 17a n.4. This was clear error. The explicit bar on judicial review of the guidelines is a jurisdictional barrier, and federal courts are required to determine their jurisdiction before proceeding to the merits of the case. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976). This is especially true when the decision on the merits involves, as here, an important issue of constitutional law. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541-42 (1986). Thus, the Ninth Circuit was obligated to determine if the second sentence of subsection (b)(6)(A) bars these cases irrespective of the effect of the first sentence. If it does, then there is no constitutional infirmity to the first sentence under any circumstances.

SAS argues that the no judicial review portion of subsection (b)(6)(A) merely bars a claim that the (b)(3) and (b)(5) statutory guidelines are unlawful, and does not bar judicial review of ***agency actions*** implementing the statutory guidelines. Brief of Respondents Seattle Audubon Society, et al. ("Respondents' Brief") at 35 n.29. Thus, they argue, this sentence does not bar any challenge to an individual timber sale offered to implement the mandatory sale program established in Section 318(a). *Id.*

SAS' view of the no judicial review provision makes no sense, and fails to ascribe any meaning whatever to this sentence, contrary to the rule of statutory construction requiring courts to give effect to every word in a statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Courts cannot review one statute for consistency with another statute; the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, ***only*** authorizes judicial review of ***agency action***, expressly excluding Congress from the definition of agency. 5 U.S.C. § 701(b)(1)(A). It is well settled that "[u]nlike an agency decision to pursue action which has significant potential environmental effects, a congressional decision that such an action may proceed is not subject to judicial review." *Texas Comm'n on Natural Resources v. Bergland*, 573 F.2d 201, 209 (9th Cir.), *cert. denied*, 439 U.S. 966 (1978); *Enos v. Marsh*, 769 F.2d 1363, 1375 (9th Cir. 1985). Thus, merely to read the second sentence of subsection (b)(6)(A) as prohibiting judicial review of an act of Congress -- where no such judicial review was previously available -- would be to deprive that sentence of any legal significance. This court's duty, to the contrary, is to interpret that sentence to give it some meaning. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

This duty is not fulfilled by suggesting, as does SAS, that this sentence bars a constitutional challenge to the (b)(3) and (b)(5) guidelines. No one has ever hinted that there could be any constitutional infirmity to these congressional prescriptions for management of the public lands in light of Congress' broad authority to legislate regarding public property. U.S. Const. art. IV, § 3, cl. 2; *see California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987). Since there is no imaginable constitutional challenge to the spotted owl guidelines, the second sentence of subsection (b)(6)(A) cannot reasonably be viewed as intended to bar such a claim. Further, the language of this sentence bars "judicial review," the specific term used in the APA for review of agency action, not acts of Congress.

Thus, to give some actual meaning to this sentence, it is necessary to interpret it as barring judicial review of some form of agency action. This interpretation must also be consistent with the explicit grant of judicial review for individual timber sales set out in Section 318(g)(1).

The only plausible interpretation of the second sentence of subsection (b)(6)(A) is that it bars judicial review of timber sales offered in compliance with the (b)(3) Forest Service guidelines based on a claim that the guidelines (1) fail to maintain a viable population of spotted owls as required under the Forest Service's NFMA regulations, 36 C.F.R. § 219.19 (1991), (2) allow unlawful taking of spotted owls under the MBTA or (3) were not preceded by a legally adequate environmental impact statement under NEPA analyzing the effect of the sales on spotted owls.[2] These were the three claims asserted in *Seattle Audubon Society* against the prior Forest Service management plan. There are no other claims which this sentence could reasonably be interpreted as barring, and to give that sentence effect it must be construed to bar these claims. Yet these are the precise claims on which Judge Dwyer enjoined the 16 timber sales following the Ninth Circuit ruling.

The Fifth Circuit's decision in *Texas Comm'n on Natural Resources v. Bergland*, 573 F.2d 201, barred judicial review in circumstances strikingly similar to those presented here. In that case, a lawsuit had produced a preliminary injunction against the practice of clearcutting in the national forests of Texas. *Id.* at 206, 209 n.7. Congress responded to the preliminary injunction and to an injunction in another case by enacting the NFMA to govern future timber harvesting practices. For a two-year period while the Forest Service was developing a new management plan, Congress enacted interim statutory authori-

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[2] Likewise BLM sales could not be challenged on spotted owl grounds under the laws invoked in *Portland Audubon Society*. No such sales were in fact challenged during fiscal year 1990.

zation for clearcutting to continue (known as the "Church guidelines"). *Id.* at 209-10. The Texas litigants sought to block implementation of the Church guidelines not by a direct attack on the congressional enactment but through an indirect attack on individual timber sales based on alleged noncompliance with NEPA. Although the court held that the Forest Service was subject to NEPA, it nonetheless held that enactment of the Church guidelines barred the courts from interfering with agency implementation of the statutory directive. *Id.* at 210.

In this case, Congress made the preclusion of judicial review -- both direct *and* indirect -- explicit rather than implicit as it was in *Texas Comm'n on Natural Resources*. The express language of the last sentence of section (b)(6) compels this court to find that Congress has precluded judicial review for fiscal year 1990 of agency action which implements the statutory spotted owl guidelines.

Thus, since the second sentence of (b)(6)(A) bars the challenges to timber sales permitted by the Ninth Circuit and upheld thereafter by Judge Dwyer, it was unnecessary for the Ninth Circuit to reach the separation of powers issue presented by the first sentence of subsection (b)(6)(A). This court can and should resolve this case through interpretation of subsections (b)(3), (b)(5) and the second sentence of subsection (b)(6)(A) without ever reaching the constitutional question wrongly decided by the court below.

III. SAS DOES NOT EVEN ATTEMPT TO DEFEND THE NINTH CIRCUIT'S RULING THAT AN APPROPRIATIONS MEASURE MAY NOT IMPLICITLY REPEAL ANOTHER STATUTE.

The Ninth Circuit recognized that subsection (b)(6)(A) would be constitutional if it implicitly repealed the environmental statutes on which claims were based in *Seattle Audubon Society* and *Portland Audubon Society*. Pet. App. at 16a. However, it ruled that it was barred from applying "a saving

interpretation of section (b)(6)(A)" because Congress cannot enact an implied partial repeal of a statute in an appropriations measure. *Id.* This ruling is directly contrary to this court's decision in *United States v. Will*, 449 U.S. 200 (1980), in which this court specifically upheld an implied repeal of a statute enacted in an appropriations measure. *Id.* at 222-23. *Will* followed a century-long line of cases upholding appropriations acts containing implied repeals of statutes. *United States v. Dickerson*, 310 U.S. 554, 562 (1940); *Mathews v. United States*, 123 U.S. 182, 186 (1887); *United States v. Mitchell*, 109 U.S. 146, 149-50 (1883).

Significantly, SAS does not even attempt to defend the Ninth Circuit's erroneous rule of constitutional analysis. It concedes that an appropriations measure may implicitly repeal an earlier statute if Congress' intent to do so is clearly manifested. Respondent's Brief at 36-37 n.30.

The Ninth Circuit's contention that its analytical principle followed this court's ruling in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), Pet. App. at 16A, is in error. *Hill* merely holds that the act of appropriating funds for a project, with no statutory language whatever, did not repeal the application of another statute to the project in question. *Id.* at 189. Indeed, the *Hill* court agreed that Congress ***could*** repeal a substantive law by implication in an appropriations act, but held that it had not done so in that case. *Id.* at 190-93. Here, where Congress enacted detailed substantive legislation, the fact that the legislation is found in an appropriations measure does not bar the legislation from implicitly repealing other statutes.

IV. SECTION 318 AMENDS OR REPEALS OTHER ENVIRONMENTAL STATUTES TO THE EXTENT NECESSARY TO ACHIEVE THE GOALS OF THE STATUTE.

Since SAS concedes that Section 318 ***could*** operate as an implied repeal of other environmental statutes if Congress

intended it to do so, it is forced to argue that Congress did not intend Section 318 to repeal or amend any other environmental law. The linchpin of its argument is that Congress intended all of the existing environmental laws to continue to apply in full to Forest Service and BLM management activities during fiscal year 1990 and intended Section 318's special measures to operate merely as one more overlay of regulation on top of the existing laws. Respondents' Brief at 41-43.

This argument is preposterous. SAS is contending that Congress really intended Section 318 to have no effect at all, to fail to achieve its intended purposes, and to leave in place the litigation-induced timber supply crisis that prompted the legislation in the first place. No reasonable court could possibly ascribe such a bizarre intention to Congress, and SAS' argument must be rejected.

A. Congress intended Section 318 to resolve the timber supply crisis in Washington and Oregon for fiscal year 1990.

Section 318 was no dead-of-night appropriations rider enacted in secrecy, as SAS contends. Rather, it was a thoughtful and reasoned congressional response to a highly publicized regional crisis in the Pacific Northwest which had been occurring for some six months by the time Section 318 was passed.

The congressional debate on the floor of both houses of Congress clearly described the open process leading to the enactment of Section 318. As Senator Adams stated:

> The controversy over efforts to protect the spotted owl and its habitat has produced one of the most painful dilemmas the Northwest has ever faced.
>
> The timber provision of this bill was developed in response to the desperate

timber supply crisis in Washington and Oregon resulting from this situation. This supply crisis arose as a result of preliminary injunctions and environmental lawsuits, which tied up a large portion of our region's timber supply in court during the past year.

. . . .

Unfortunately, the severity of the crisis this year did not give us the luxury of time to slowly mull over this issue. Mills were shutting down. Jobs were threatened and gone. Our State was being torn apart, and tensions were rising with the very real potential of violence.

We in the Northwest delegations waited and waited, as negotiations stopped and started. We waited as lawsuits were filed and injunctions were established. We waited as the agencies attempted to address the problems, without success. Deadlines were set and passed. By this summer, the summer of 1989, we realized that immediate action was required and the last stop left was the appropriation process. Nothing had been done in the authorizing committees; nothing had been done on the House side, and this was the last chance.

In July, Senator HATFIELD and I reluctantly decided to grasp the thorn and include a provision in the Interior appropriations bill. I am grateful to the members of that committee, to the chairman and my colleagues in the

> Senate for their patience and assistance in helping design this provision.
>
> The amendment was introduced with the members of the Oregon and the Washington delegations, all of them supporting the process.

135 Cong. Rec. S12961 (daily ed. Oct. 7, 1989) (remarks of Sen. Adams).

Senator Hatfield also agreed:

> Senator ADAMS of Washington State, and I met frequently with our individual colleagues, and certainly the total delegations from Washington State and Oregon met on a number of occasions to work out the Senate position. It included the support of Governor Neil Goldschmidt, of Oregon, and Governor Boothe *[sic]* Gardner, Washington State, as well. So when Senator ADAMS and I offered this in Appropriations Committee, it was really representative of a broad range of people, including all eight House Members and both Senators from Washington State, all five House Members and both Senators from the Oregon delegation and that, of course, included the Democrats as well as the Republicans, a bipartisan effort.

135 Cong. Rec. S12959 (daily ed. Oct. 7, 1989) (remarks of Sen. Hatfield).

As SAS concedes, the Senate version of Section 318 received extensive review in the House of Representatives, with

more than 100 members of Congress expressing opinions on the bill. Respondents' Brief App. B.

There is extensive legislative history stating Congress' purpose in enacting Section 318. The Conference Report on the fiscal year 1990 Interior Appropriations Act discusses the measure in detail, and 15 members of Congress discussed the statute on the floor of both houses (ten in the House of Representatives and five in the Senate). There is remarkable uniformity in this legislative history as to the purpose of Section 318: to break the litigation gridlock which had tied up the federal timber supply in the Pacific Northwest in 1989, and to restore certainty of timber supply to timber-dependent communities and businesses during fiscal year 1990.

Representative AuCoin of Oregon, a primary sponsor of the bill, stated:

> [Section 318] calls for a cease-fire in the war over the public forests of the Pacific Northwest.
>
> . . . [T]he amendment provides a 1-year breathing space for the lumber and plywood mills of Oregon and Washington which depend on national forests and BLM lands for their raw materials; it provides a 1-year reprieve for the towns and communities across Oregon and Washington whose existence depends on those mills.

135 Cong. Rec. H6506 (daily ed. Oct. 3, 1989).

Representative DeFazio of Oregon stated:

> This agreement . . . lifts for 1 year a shadow from the timber dependent communities of

> Oregon and Washington which look to the forests for their jobs and their futures.

135 Cong. Rec. H6505 (daily ed. Oct. 3, 1989).

Representatives Dicks, Swift, Unsoeld and Wyden expressed similar sentiments. 135 Cong. Rec. H6509-10, H6531-32 (daily ed. Oct. 3, 1989).

The Senate backers of the bill fully shared these views. Senator Hatfield stated:

> . . . [T]his amendment was offered reluctantly as a 1 year, short-term, solution to the timber supply crisis that currently exists in Oregon and Washington. . . .
>
> . . . .
>
> . . . [T]his amendment provides a predictable supply of Federal timber for the region's sawmills. . . . Only through a predictable timber supply can we successfully stabilize the economies of the [timber-dependent] communities and provide economic security for the people who live in them.

135 Cong. Rec. S12979 (daily ed. Oct. 7, 1989).

Senator Gorton stated:

> The purpose of this short-term agreement is two-fold: It strives to ensure timber to mills on the brink of complete shut-down; and it strives to prevent fragmentation of significant stands of old-growth forest. In the midst of

> the Northwest timber crisis, this amendment seeks to provide short-term stability.

135 Cong. Rec. S12962 (daily ed. Oct. 7, 1989).

The Conference Report on Section 318 echoes this congressional intent:

> In developing the amendment, the managers have sought to balance the goals of ***ensuring a predictable flow of public timber for fiscal year 1990*** and protecting the northern spotted owl and significant old growth forest stands.

H. R. Conf. Rep. No. 264 at 87 (emphasis supplied).

Section 318(a) implemented this congressional intent by mandating that the Forest Service and the BLM "shall offer" the volume of timber sales specified in the law, a sharp departure from previous appropriations acts which merely provided funds for timber sales without requiring them to be offered. The language of Section 318(a) imposed on the Forest Service "a continuing duty to offer 7.7 BBF [billion board feet] of timber for sale on or before September 30, 1990 from the national forests of the states of Oregon and Washington." *Gifford Pinchot Alliance v. Butruille*, 742 F. Supp. 1077, 1083 (D. Or. 1990); *accord Gifford Pinchot Alliance v. Butruille*, 752 F. Supp. 967, 971 (D. Or. 1990).

B. Congress intended to amend or repeal the existing environmental laws to the extent necessary to remedy the crisis created by those laws.

Congress clearly understood the legal issues in *Seattle Audubon Society* and *Portland Audubon Society*. Congress was thus well aware that the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq.*, was the only environmental law applicable to spotted owls that was ***not*** the basis of any claim asserted

in either *Seattle Audubon Society* or *Portland Audubon Society*. Therefore it was unnecessary for Congress to amend the ESA to effectuate Section 318, and in enacting Section 318, Congress explicitly disclaimed any implication that it was amending the ESA. In Section 318(e) Congress specifically directed that "nothing in the statute shall affect" the interagency cooperation and consultation process with the U.S. Fish and Wildlife Service required under Section 7 of the ESA, 16 U.S.C. § 1536, or its implementing regulations.

Representative AuCoin reaffirmed this intent on the floor of the House:

> The special management habitat areas for the spotted owl are driven by the National Forest Management Act, not by the Endangered Species Act, so in this compromise as we have increased those management areas to protect the spotted owl, we are in no way touching the Endangered Species Act process that will determine whether or not the spotted owl is threatened or endangered.

135 Cong. Rec. H6507 (daily ed. Oct. 3, 1989). A proposal to list the spotted owl as a threatened species under ESA was pending at the time Section 318 was enacted. 54 Fed. Reg. 26666 (June 23, 1989).

Congress' explicit disavowal of any intent to amend the Endangered Species Act demonstrates its view that without that specific disclaimer the ESA would have been amended by the enactment of Section 318. Thus, Congress clearly understood that Section 318 ***did*** amend or repeal the specific environmental laws applicable to spotted owls that ***were*** the basis of the claims in *Seattle Audubon Society* and *Portland Audubon Society*. Representative Vento of Minnesota expressed this understanding clearly:

> The fact is the existing laws do not work. We have ended up in a quagmire of court cases and a stalemate that had resulted in severe economic and environmental problems in the Pacific Northwest.
>
> This measure is a reasoned and balanced approach that moves forward to free up and provide some relief in terms of the economy plus a policy path that will be workable for the near future. . . .
>
> . . . The existing laws, all well intended have all resulted in gridlock. We as a Congress must attempt to craft modifications that will prevent this in the future. The Interior appropriations effort is a start -- a good outcome under tough circumstances.

135 Cong. Rec. H6509 (daily ed. Oct. 3, 1989). Representative Vento was one of the 100 representatives who signed the letter attached as Appendix B to the respondents' brief that they claim supports their interpretation of congressional intent. Yet plainly Representative Vento understood that the existing laws *were* being modified by Section 318 as enacted by Congress.

Legislative history analysis aside, the point is that Congress intended Section 318 to work. If, as SAS contends, Congress meant to leave in place the very laws that had created the timber supply crisis in the first place, it would not have bothered to enact a Section 318 at all. Under SAS' theory of congressional intent, Congress intended the courts to be able to continue to apply in fiscal year 1990 all the same laws they had used in fiscal year 1989 to disrupt the federal timber supply. The existing injunction would not have been lifted, the "cease fire" would not have occurred, the "1-year breathing space"

would not have been granted and the "stalemate" would not have ended. SAS asks this court to believe that Congress went through an elaborate charade to enact a statute that would accomplish absolutely nothing. The court must reject this unwarranted construct of irrational congressional intent.

SAS offers three arguments to support its contention that Congress intended to act in this irrational manner. None of these arguments has any merit.

1. First, SAS relies on a sentence of the Conference Report on Section 318 stating: "This section in no way alters application of the Endangered Species Act or other environmental laws to Forest Service and BLM management activities." H. R. Conf. Rep. No. 264 at 89.

Since, as noted above, the ESA was not a basis for any claim in *Seattle Audubon Society* or *Portland Audubon Society*, the reference to that law has no bearing on this case at all. SAS' apparent reliance is on the phrase "or other environmental laws" in the quoted passage. This phrase sheds no light on Congress' intent for at least four reasons:

a. There is no explanation of which "other environmental laws" the Committee is referring to; thus, it is impossible to say whether the reference is to the laws invoked in *Seattle Audubon Society* and *Portland Audubon Society*.

b. In fact, many "other environmental laws" remained fully in effect and were in no way altered by Section 318. These include the Clean Water Act, the Clean Air Act, the Wild and Scenic Rivers Act, and many others which have no bearing on wildlife protection.

c. Even as to the specific group of environmental laws invoked in *Seattle Audubon Society* and *Portland Audubon Society*, all of them remained in effect ***except with regard to***

northern spotted owls. Thus, for example, under Section 318 NEPA, NFMA and MBTA would apply with regard to other wildlife species and other non-wildlife environmental issues applicable to management of federal forests in the Pacific Northwest. The district court in Oregon so held in *National Wildlife Fed'n v. United States Forest Service*, Civil No. 83-1153-LE (March 5, 1990), App. A hereto at 11a-12a.

d. The sentence's reference to the application of environmental laws to "Forest Service and BLM ***management activities***" does not apply to the (b)(3) and (b)(5) guidelines because implementing those non-discretionary statutory guidelines does not constitute a "management activity."

2. SAS' second argument is that the change of language between the Senate version of Section 318 and the version passed by Congress reveals an intent not to repeal or amend any existing environmental law. In support of this argument they offer a letter signed by members of Congress. Respondents' Brief, App. B. This letter fails to make the point for which it is cited by SAS. The letter says nothing about amending or not amending existing environmental laws. Rather, it deals with the availability of "judicial remedies," Respondents' Brief, App. 8a, 9a, and the "insulation of agency activities." *Id.* at 9a. Nothing in the letter indicates that its authors objected to the temporary amendment of the underlying existing laws. Representative Vento, one of the signers, clearly did not object to amending the existing laws. 135 Cong. Rec. H6509 (daily ed. Oct. 3, 1989).

There were no (b)(3) or (b)(5) guidelines set out in the Senate version of Section 318. It merely directed the agencies to sell timber "notwithstanding" the laws invoked in *Seattle Audubon Society* and *Portland Audubon Society*. The enacted version of Section 318 became far more specific and substantive by enacting the detailed (b)(3) and (b)(5) guidelines. Nothing in the congressional letter even remotely suggests that its

authors intended to make the subsequently-enacted version of Section 318 meaningless by leaving the conflicting environmental laws in place. To the contrary, adoption of the (b)(3) and (b)(5) guidelines shows more clearly in the enacted version than in the Senate version that Congress did not intend the existing laws to frustrate the specific statutory purposes of Section 318.

3. Third, SAS claims that the government had once interpreted Section 318 to allow NEPA, NFMA and MBTA to remain in effect with regard to spotted owl management. Respondents' Brief at 41-42. The record of the two cited cases, *Gifford Pinchot Alliance v. Butruille*, 742 F. Supp. 1077, and *Gifford Pinchot Alliance v. Butruille*, 752 F. Supp. 967, plainly reveals the contrary. In those two cases the Forest Service argued and the courts ruled that Section 318 did not bar application of the ***ESA*** and of ***non-spotted owl*** environmental laws. *Gifford Pinchot Alliance v. Butruille*, 742 F. Supp. at 1079-81; *Gifford Pinchot Alliance v. Butruille*, 752 F. Supp. at 972. The Forest Service has never argued to any court that NEPA, NFMA and MBTA applied to its spotted owl management during fiscal year 1990.

Thus there is no basis whatever to conclude, as SAS is forced to contend, that Congress intended to leave in place the statutes that had caused the regional timber supply crisis Section 318 was enacted to resolve.

CONCLUSION

In 1989 the courts created a crisis in the timber economy of the Pacific Northwest. Through the process of democratic government, Congress responded to this crisis by enacting legislation to resolve the crisis for fiscal year 1990. The decision below nullifies the democratically determined will of Congress. If there is a separation of powers violation in this case it has been committed by the decision below, which employed

plainly erroneous constitutional analysis to defeat the will of Congress as expressed in legislation which violates no provision of the Constitution.

The judgment of the Court of Appeals should be reversed.

Dated this 13th day of November, 1991.

Respectfully submitted,

MARK C. RUTZICK*
TIMOTHY J. SERCOMBE
PRESTON THORGRIMSON
SHIDLER GATES & ELLIS
3200 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 228-3200

Counsel for Respondents Northwest Forest Resource Council, et al.

**Counsel of Record*

APPENDIX TO REPLY BRIEF OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, ET AL.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,	)	
	)	Civil No. 83-1153-LE
Plaintiffs,	)	
v.	)	
UNITED STATES FOREST SERVICE, et al.,	)	
	)	OPINION
Defendants,	)	
and	)	
DAVIDSON INDUSTRIES, INC., et al.,	)	
Defendants-Intervenors.	)	

ROY E. ELICKER
National Wildlife Federation
519 S.W. Third Avenue
Suite 606
Portland, OR 97204

Attorney for Plaintiff National Wildlife Federation.

GARY D. MEYERS
6924 S.W. Montauk Circle
Lake Oswego, OR 97035

Attorney for Plaintiff Oregon Wildlife Federation.

VICTOR M. SHER
TODD D. TRUE
DENISE E. ANTOLINI
Sierra Club Legal Defense Fund, Inc.
216 First Avenue South
Suite 330
Seattle, WA 98104

RICHARD A. PARRISH
215 S.W. Washington
Suite 200
Portland, OR 97204

Attorneys for Plaintiff Siuslaw Task Force.

CHARLES H. TURNER
U.S. Attorney
THOMAS C. LEE
Assistant U.S. Attorney
312 U.S. Courthouse
620 S.W. Main
Portland, OR 97205

Attorneys for Federal Defendants.

PHILLIP D. CHADSEY
RICHARD D. BACH
Stoel, Rives, Boley,
Jones & Grey
900 S.W. Fifth Avenue
Suite 2300
Portland, OR 97204-1268

Attorneys for Defendants-Intervenors.

MARSH, Judge.

On August 6, 1984, this court entered judgment enjoining timber sales in the Mapleton Ranger District of the Siuslaw National Forest ("Mapleton District") pending the Forest Service's compliance with the National Environmental Policy Act. At issue before me now is the motion of defendant United States Forest Service *et al.* ("federal defendants") to modify the Amended Judgment of August 6, 1984 and plaintiff Siuslaw Task Force's cross-motion to modify this judgment. For the reasons set forth below, I grant both the federal defendants' and plaintiff Siuslaw Task Force's motions to modify.

FACTS

The Mapleton District is comprised of approximately 200,000 acres in the center of Oregon's coast range. As this court previously found, the District is "particularly susceptible to soil erosion" and this erosion has "dramatically increased" as a result of road building and timber harvesting. *National Wildlife Federation v. United States Forest Service*, 592 F. Supp. 931, 934 (D. Or. 1984), *as amended*, 801 F.2d 361 (9th Cir. 1986).

In 1982, the Forest Service issued a Seven Year Action Plan for the Mapleton District "proposing to harvest, primarily by clearcutting, approximately 100 million board feet a year."

National Wildlife Federation, 592 F. Supp. at 936. In 1983, plaintiffs brought this action for injunctive relief contending that the Seven Year Action Plan violated the National Forest Management Act, 16 U.S.C. § 1600 *et seq.*, the Multiple-Use Sustained Yield Act, 16 U.S.C. §§ 528-531, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321-4361.

The court found that the Forest Service's failure to prepare an environmental impact statement for the Seven Year Action Plan violated NEPA because the proposed timber sales constituted "major Federal actions significantly affecting the quality of the human environment" under 42 U.S.C. § 4332(2)(c). *National Wildlife Federation*, 592 F. Supp. at 940. Accordingly, the court enjoined the Forest Service from offering for sale any timber in the Mapleton District, with very limited exceptions, until the federal defendants submit to the court a final environmental impact statement.

Subsequent to the issuance of this injunction, Congress has twice legislated to limit the scope of the court's Mapleton District injunction. In 1985, Congress enacted legislation which authorized the Forest Service to resell certain timber sales from the Mapleton District that had previously been sold but returned to the Forest Service. Supplemental Appropriations Act, 99 Stat. 293, 340 (Aug. 15, 1985). The Act provided that such timber could be resold "notwithstanding any other provision of law, and notwithstanding the injunctions issued in National Wildlife Federation et al. v. United States Forest Service et al., 593 F. Supp. 931 (D. ORE. 1984) and in No. 84-4272 (9th Cir., March 6, 1985)." Supplemental Appropriations Act, 99 Stat. 293, 340. The Act further provided that "[a]ny decision of the Secretary of Agriculture to resell such timber shall not be subject to judicial review." *Id.*

Based on the 1985 Act and upon motion by the federal defendants, on January 3, 1986 the court modified the Amended Judgment by adding the following paragraph:

> 9. Paragraph 1-8 of the Amended Judgment, and the injunction therein, shall not apply to the resale or resale as modified, pursuant to Public Law No. 99-88, 99 Stat. 293, 340 (August 15, 1985), of timber sales that are returned to the federal defendants pursuant to the Federal Timber Contract Payment Modification Act, 16 U.S.C.A § 628, or which are defaulted.

In 1988, Congress once again acted to limit the scope of the Mapleton District injunction. The 1988 legislation authorized the Forest Service to sell up to 90 million board feet of timber in the Mapleton District in the Fiscal Year 1989 "notwithstanding the injunction issued pursuant to the judgment in the National Wildlife Federation, et al., v. United States Forest Service, et al. (592 F. Supp. 981 (D. Ore. 1984), as modified by 801 F. 2d 360 (9th Cir. 1986))." Department of Interior Appropriations Act, Public Law No. 100-446, § 321 (Sept. 27, 1988). Section 321 provided that

> [f]or the purposes only of selling timber pursuant to this section . . . the Secretary shall utilize the Siuslaw National Forest draft land and resource management plan and accompanying draft environmental impact statement dated October 1, 1986 as if they were the final forest plan and environmental impact statement.

Section 321 specifically provided that for the purpose of this section, this draft statement ". . . shall be treated as satisfying all requirements of the National Environmental Policy Act of 1969 . . . and shall not be subject to administrative or judicial review" for noncompliance with NEPA. Section 321 expired September 30, 1989.

Based on the 1988 Act and upon motion by the federal defendants, on November 30, 1988 the court modified the Amended Judgment by adding the following paragraph:

10. Paragraphs 1-8 of this Amended Judgment, and the injunction therein, shall not apply to timber sales on the Mapleton Ranger District during Fiscal Year 1989, of up to 90 million board feet of net merchantable timber, offered pursuant to Public Law No. 100-446 (Sept. 27, 1988), Section 321.

The issue before me now is whether Congress has similarly exempted 1990 timber sales from the Mapleton District injunction through its enactment of § 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Public Law No. 101-121, 103 Stat. 701, 7455-50 *[sic]* (1989).

DISCUSSION

Both parties agree that § 318 of the 1989 Appropriations Act modifies the Amended Judgment in this action by allowing timber sales in the Mapleton District which were released by agreement between the parties pursuant to § 318(f)(1).[1]

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[1] Section 318(f)(1) provides that "[n]ot later than two days after enactment of this Act, the Forest Service shall submit to plaintiffs in the captioned case Seattle Audubon Society et al. v. F. Dale Robertson Civil No. 89-160, a list of sales which had been prepared for offer in fiscal year 1989 and which contain at least 40 acres of suitable spotted owl habitat. Not later than fourteen days after receipt of such list, plaintiffs . . . may enter into an agreement with the Forest Service releasing for sale not less than one billion one hundred million board feet of net merchantable timber . . . Such timber sales selected shall not be subject to further judicial review by a court of the United States." Pursuant to § 318(f)(1), certain

(continued...)

The parties disagree, however, as to whether § 318 acts to release other timber sales in the Mapleton District. Defendants argue that § 318 modifies the Amended Judgment by providing that the injunction does not apply in 1990 to proportionately allowed timber sales in the Mapleton District that are consistent with the preferred alternative of the Siuslaw National Forest's draft land and resource management plan and accompanying draft environmental impact statement. Plaintiff Siuslaw Task Force contends that § 318 does not modify the Amended Judgment in this manner because § 318 does not relieve the Forest Service of its obligation under NEPA to prepare a final environmental impact statement for the Mapleton District.

Section 318(a)(1) of the 1989 Appropriations Act provides that

> [t]he Forest Service shall offer, notwithstanding the provisions of the Federal Timber Contract Payment Modification Act of 1984 (16 U.S.C. § 618(a)(5)(c)), an aggregate timber sale level of seven billion seven hundred million board feet of new merchantable timber from the national forests of Oregon and Washington for fiscal years 1989 and 1990. Such timber sales shall be consistent with existing land and resource management plans or land and resource management plans as ap-

---

[1] (...continued)
environmental groups and the Forest Service reached agreement to release a number of timber sales including six sales on the Mapleton District. Plaintiff concedes that Congress has expressly directed that these six sales go forward despite the scope of the Amended Judgment in this action because, unlike § 318(a)(1), agreements entered into pursuant to § 318(f)(1) are not subject to judicial review.

> proved *except, in the case of the Mapleton Ranger District of the Siuslaw National Forest, Oregon, such sales shall be consistent with the preferred alternative of the draft land and resource management plan and accompanying draft environmental impact statement dated October 1, 1986, pending approval of a final land and resource management plan for the Siuslaw National Forest*: *Provided*, That of the seven billion seven hundred million board foot aggregate timber sale level for fiscal years 1989 and 1990, timber sales offered from the thirteen national forests in Oregon and Washington known to contain spotted owls shall meet an aggregate timber sale level for fiscal years 1989 and 1990 of five billion eight hundred million board feet of net merchantable timber: *Provided further*, That the sales volume shall be distributed in the same proportion between Oregon and Washington national forests known to contain northern spotted owls based on the average sale volume for fiscal years 1986 through 1988.

(Emphasis added).

Defendants argue that because § 318(a)(1) lists the Mapleton District as part of its total annual timber harvest for the Fiscal Year 1990, this section must be interpreted as a replacement of the 1988 Appropriations Act provision which gave rise to this court's order of November 29, 1988 amending the scope of the Mapleton District injunction. Defendants contend that § 318(a)(1) lifts the injunction in this case for an additional year so as to allow timber sales in the Mapleton District to proceed notwithstanding defendants' failure to complete a final environmental impact statement.

Defendants also argue that § 318 modifies the Amended Judgment to allow 1990 timber sales to proceed because § 318 removes the legal basis for the Amended Judgment. Defendants argue that this is so because § 318 precludes the court from determining whether timber sales covered by § 318 are in

violation of NEPA. Defendants argue that because NEPA violations were the basis for the injunction in this case, the Mapleton District injunction must be suspended for 1990. In support of this position, defendants rely on the following language from § 318(b)(5)(A):

> Congress hereby determines and directs that management of areas according to subsections (b)(3) . . . of this section on the thirteen national forests in Oregon and Washington . . . known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) . . . of this section shall not be subject to judicial review by any court of the United States.

Subsection (b)(3) in turn provides that no timber sales offered from the thirteen national forests in Oregon and Washington known to contain spotted owls may occur within Spotted Owl Habitat Areas ("SOHA") "identified pursuant to the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide - Spotted Owl and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 as adjusted by this subsection." Subsection (b)(3) sets forth modified SOHA sizes for specified national forests in Oregon and Washington.

I find that § 318(a)(1) modifies the injunction in this case by allowing timber sales to proceed in the Mapleton District as part of the mandated sale of seven billion seven hundred million board feet provided that such sales are consistent with the preferred alternative of the draft land and resource man-

agement plan and accompanying draft environmental impact statement dated October 1, 1986.

Plaintiff's contention that § 318 is not applicable to this case because the purpose of this section was limited merely to problems associated with the northern spotted owl is not supported by the record. The purpose behind § 318 was an attempt "to balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted own *and* significant old growth forest stands." Conference Report No. 101-264 at 87 (Oct. 2, 1989)(emphasis added). As the Conference Committee explained, § 318 was a legislative response to court challenges that "have raised serious concerns about the adequacy of planned actions of the agencies with regard to managing habitat for the northern spotted owl *and* minimizing fragmentation of old growth stands." Conference Report at 87 (emphasis added). "The net result of the legislation, after a prolonged debate in Congress, is to set aside, for one year, certain requirements of the environmental laws so that logging may go forward in old-growth national areas that contain spotted owl habitat." *Seattle Audubon Society, et al. v. Robertson et al.*, Civ. No. 89-160-WD, slip. op. at 1-2 (W.D. Wash. November 14, 1989). This goal is accomplished through the establishment of interim guidelines for the management of spotted owl habitat and the removal for fiscal year 1990 of "the sufficiency or insufficiency of those standards as a reason for injunctive relief." Conference Report at 87.

In contrast to both the 1985 and 1988 Appropriations Acts which altered or suspended the Mapleton District injunction, § 318(a)(1) does not mention this action by name or direct that timber be sold "notwithstanding the injunction issued" by this court. However, § 318(a)(1) does set forth a standard for these sales which is at variance with the standard required in the Amended Judgment in this case. Accordingly, I find that § 318(a)(1) presents a "clear and unavoidable conflict" in statutory authority between that section and the requirements

of NEPA upon which the Amended Judgment in this case was based. *See California v. Block*, 690 F.2d 753 (9th Cir. 1982)(holding that federal agencies must comply with NEPA "to the fullest extent possible unless there if *[sic]* a 'clear and unavoidable conflict in statutory authority.'" *Id.* at 775 quoting *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976)). The reference to the Mapleton District in § 318(a)(1)'s directive that seven billion seven hundred million board feet be sold in Oregon and Washington national forests in Fiscal Years 1990 clearly shows that Congress intended that a portion of the aggregate timber sales take place in the Mapleton District. I find that the only plausible explanation for the inclusion of § 318(a)(1)'s provision relating to the Mapleton Ranger District of the Siuslaw National Forest is that Congress recognized that no final environmental statement exists for the Mapleton District. By establishing an alternative standard for assessing proposed timber sales in the Mapleton District, Congress thereby directed that these timber sales proceed notwithstanding the District's failure to complete a final environmental statement and consequently notwithstanding the injunction in this case which was based solely on the District's failure to complete a final environmental statement.

I reject defendants' argument that the Amended Judgment in this case is modified because § 318(b)(6)(A) nullifies all NEPA violations for the Fiscal Year 1990. Section 318(b)(6)(A)'s reference to the "statutory requirements that are the basis for the [listed] consolidated cases" is not synonymous with *any* alleged violation of NEPA. Rather, the reference to statutory requirements relates to the specific NEPA violations which were the basis for the listed cases. In the cases listed in § 318(b)(6)(A), such as *Seattle Audubon Society v. F. Dale Robertson*, Civil No. 89-160, the alleged NEPA violations related to the Forest Service's failure to adequately disclose and assess environmental consequences to the spotted owl in the Forest Service's Environmental Impact Statement for its Pacific Northwest Regional Guide - Spotted Owl Guidelines. Section

318 abates such alleged violations of NEPA for the Fiscal Year 1990 insofar as they relate to sales covered by § 318. Accordingly, my finding that Congress intended timber sales to proceed on the Mapleton District notwithstanding the permanent injunction in this action is not based on any alleged repeal of NEPA but rather Congress' directive that Mapleton District timber sales proceed provided that the preferred alternative of the draft land and resource management plan is complied with. Thus, contrary to plaintiff's contention, the presumption disfavoring repeals by implication does not apply. *See e.g. United States v. Fausto*, 108 S.Ct. 668, 676 (1988); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978); *Rembold v. Pacific First Federal Savings Bank*, 798 F.2d 1307, 1310 (9th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987).

CONCLUSION

For the reasons set forth above, I grant defendants' motion to modify the Amended Judgment of August 6, 1984 (# 238). The Amended Judgment of August 6, 1984 in this case, as modified by Order dated January 3, 1986, appellate order dated September 30, 1986 (801 F.2d 360), and Order dated November 29, 1988, is hereby further modified to add the following paragraph:

> 11. Paragraphs 1 through 8 of this Amended Judgment, and the injunction therein, shall not apply to timber sales on the Mapleton Ranger District during Fiscal Year 1990 that are consistent with the preferred alternative of the Siuslaw National Forest's draft land and resource management plan and accompanying draft environmental impact statement dated October 1, 1986, or when approved by the Regional Forester, the Siuslaw's National Forest's final land and resource management plan and accompanying final environmental impact statement.

Plaintiff's motion to modify the Amended Judgment by striking paragraph 10 (# 241) is also granted on the ground that the statutory provision on which the modifications contained in paragraph 10 were based is no longer in effect.

DATED this 5th day of March, 1990.

/s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

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In The

Supreme Court of the United States

October Term, 1990

F. DALE ROBERTSON, Chief, United States Forest Service, THE UNITED STATES FOREST SERVICE, and MANUEL LUJAN, JR., Secretary of the Interior,

Petitioners,

v.

SEATTLE AUDUBON SOCIETY, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

RONALD A. ZUMBRUN
*ROBIN L. RIVETT
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae Pacific Legal Foundation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pacific Legal Foundation (PLF) respectfully moves to file the annexed brief amicus curiae pursuant to Supreme Court Rule No. 37. Petitioner, the United States Forest Service, has given its consent to this amicus brief. Defendants-intervenors below have also given written consent to PLF's filing of an amicus brief. These letters of consent have been lodged with the clerk. However, respondents have denied consent.

IDENTITY AND INTERESTS OF AMICUS

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees, the majority of whom are attorneys. PLF's Board considers the merits of any contemplated legal action and authorizes such legal action only when it is determined that the position to be advocated has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy concerns and litigation experience in the area of environmental regulation will provide an important additional viewpoint with respect to the issues presented. PLF has participated in numerous cases before this Court, including amicus participation in *Bowsher v. Synar*, 478 U.S. 714 (1986), where PLF argued in support of appellants challenging the Washington, D.C., District Court's mechanical application of the separation of powers doctrine. Recently, PLF filed an amicus brief in support of petitioners in *Gibson v. Florida State Bar*, No. 90-1102.

The issues posed in this case are of national significance. PLF believes that determining the proper role of the federal courts, insuring that legislative will is carried out, and protecting a balanced, rational approach to conservation are concerns and issues that reach far beyond the limited facts presented on this writ of certiorari. Amicus has considerable experience with environmental

regulations and attempts to limit judicial activism. Amicus' experience and understanding of these areas form a unique public interest perspective that is well-suited to provide the Court with additional argument. Amicus has concluded that because of the national significance of these issues, the present parties cannot adequately represent the interests of the broader public while at the same time representing their own particularized positions. Petitioners and respondents in their briefs below argued on the specific merits of the case and the specific statutory language involved. While these are necessary and important arguments, PLF believes that its perspective could aid the Court in considering the broader policy concerns behind the Northwest Timber Compromise and the importance of establishing a viable precedent to follow in the future.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed brief of amicus curiae be granted.

DATED: August 16, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN
*ROBIN L. RIVETT
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

By Robin L. Rivett
ROBIN L. RIVETT

Attorneys for Amicus Curiae
Pacific Legal Foundation

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INTERESTS OF AMICUS

The identity and interests of amicus curiae are set forth in the preceding motion and are adopted herein.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Seattle Audubon Society v. Robertson*, (*Robertson*) 914 F.2d 1311 (9th Cir. 1990).

INTRODUCTION

The conflict between the northern spotted owl and the continued vitality of the logging industry is at the heart of this case. The furor over timber production and protection of the spotted owl, a threatened species under the Endangered Species Act, has been very public and very emotional. The Ninth Circuit has been called upon to adjudicate numerous issues involving the owl and other endangered or threatened species. The resultant decisions seem to have consistently favored increased species protection while allowing the Pacific Northwest timber economy to sink like a torpedoed World War II tanker[1]. In order to correct the court's unilateral decisions and return some sense of economic stability to the rural communities of the Pacific Northwest, Congress passed Section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-21, 103 Stat. 701, and enacted it on October 23, 1989. Section 318, known as the "Northwest Timber Compromise" (Compromise), insured that the interests of both

[1] *See*, for example, *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, 492 U.S. 911 (1989); *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991); *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988).

Pacific Northwest logging-dependent communities and the spotted owl were met. *See Portland Audubon Society v. Hodel*, 866 F.2d 302. However, acting in accordance with what has become an alarming trend in the Ninth Circuit, the court substituted itself as the policymaker for public lands and found the Compromise unconstitutional. Pacific Legal Foundation believes formulating public land policy is clearly the role of Congress and not the courts.

When courts make the ultimate determinations regarding environmental policy, due to the very nature of the adversarial system, one party inevitably wins and one party loses. With controversial issues such as the spotted owl, where the aims of both sides have merit, determinations of policy should be left to the Legislature.

> "Drafting, amending and enacting a bill can be a highly contentious affair that succeeds only because of compromises within the legislature. The final statute reflects the various states and intensities of legislative sentiment in the electorate. The legislation that results may be compared to a contract in which each side gives the other something in order to get some of what it wants. When [a court] distorts a statute, one side gets more than its bargain and the other gets less." Bork, *The Tempting of America* 102 (1990).

In enacting Section 318, Congress made an attempt to protect and advance the interests of all parties. The Compromise provided concurrently for the protection of the spotted owl and for the continuation of logging in national lands by allocating specific amounts of land to each activity. In order to ensure that the Compromise was

secure and land allocations would be carried out, Congress explained in Section 318 that the statutory requirements at issue in *Seattle Audubon Society v. Robertson* and *Portland Audubon Society v. Lujan* (*Lujan*), 884 F.2d 1233 (9th Cir. 1989), *cert. denied on other grounds*, ___ U.S. ___ (1990), were satisfied.

However, the Court of Appeals refused to read the Compromise as creating legitimate exemptions to certain environmental statutes. Rather, it held that Section 318 of the Compromise was an unconstitutional use of congressional authority. Instead of reading Section 318 in a constitutionally acceptable way, the Ninth Circuit interpreted Congress' language as usurping their constitutionally protected role and commanding the courts to decide *Robertson* and *Lujan* in a certain way.[2]

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[2] Section 318(b)(6)(A) which is the subsection concentrated on by the Ninth Circuit for its decision reads:

> "Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 12, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the (continued)

The Ninth Circuit's holding in *Robertson* is faulty for a number of reasons. Not only did it misinterpret a number of controlling cases, but its decision is directly contrary to one of the most fundamental principles of statutory construction. In order to find that the Compromise was unconstitutional, the Court must have determined that there was no way to give the statute a constitutional interpretation. *Mistretta v. United States*, 488 U.S. 361, 384 (1989). Pacific Legal Foundation submits that the Act can be read easily in a manner that preserves its constitutionality.

ARGUMENT

I

SECTION 318 DID NOT DICTATE THE OUTCOME OF CASES, RATHER IT PROVIDED EXEMPTIONS TO NATIONAL ENVIRONMENTAL POLICIES; THEREFORE, CONGRESS DID NOT INTRUDE ON THE APPROPRIATE FUNCTIONS OF THE JUDICIARY

The underlying issue in this case would appear to be rather simple. Does Congress have the authority to

statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States."

manage the public lands? Of course the answer is yes. There is only one reason why this case is before the Court: the Ninth Circuit took umbrage with the "method" Congress used to exercise its management authority.

Congress, tired of a never ending series of lawsuits brought by environmental activists to stop timber harvesting in the Pacific Northwest, passed the Compromise. The purpose was to amend or repeal the application of a series of environmental planning laws to particular public lands so that timber sales on those lands would no longer be delayed by court action. Congress' authority to do this cannot be questioned. Even the Ninth Circuit acknowledged in the decision below: "Congress can *amend* or *repeal* any law, even for the purpose of ending pending litigation." *Seattle Audubon Society v. Robertson*, 914 F.2d at 1315 (emphasis in original, citations omitted).

But the court also ruled that Congress can alter the outcome of pending litigation only when " 'new circumstances have been created by legislation.' " *Robertson*, 914 F.2d at 1315 (quoting *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871)). The Court failed to find such "new circumstances" and instead ruled that Congress had violated the separation of powers tenet as interpreted by *Klein*.

In this section, Pacific Legal Foundation will show that the Ninth Circuit's invalidation of the Compromise, in principal reliance on *Klein*, is incorrect and based on strained analogies and logic. In actuality, the Compromise did indeed create new circumstances, and Section 318 amended or partially repealed the statutes at issue so they no longer applied to Compromise lands.

Amicus submits that *Klein* is being misapplied and that other precedents are more appropriate in light of the fact pattern of this case and the prior holdings of the Ninth Circuit.

A. Not Only Has Klein Been Misinterpreted by Respondents and the Ninth Circuit but Wheeling Bridge Is a More Appropriate Precedent to Follow

It is undisputed that Congress has the authority to manage and control activity on federal lands.[3] It is also clear that with the advent of environmental protection statutes, courts have become heavily involved not just in saying what the law is, but in interpreting and establishing federal environmental policy and land management requirements. Making such policy decisions is not a constitutionally envisioned role for the courts. Of course, in the absence of clear guidance from the Congress, it has been necessary to turn to the courts in order to understand environmental statutes. And, when there is no legislative or executive action, it may be appropriate for the courts to fill this void. However, when Congress seeks, as

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[3] *See Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1905): "Congress is the body to which is given the power to determine the conditions upon which the public lands should be disposed of. . . . The nation is an owner, and has made Congress the principal agent to dispose of its property." Also, in *Light v. United States*, 220 U.S. 523, 536 (1911), the Court explained that Congress was free to administer national lands without interference from the courts.

it does now, to exercise its legitimate authority and provides clear direction as to its desired policy result, the courts must defer and relinquish any role they may have obtained due to Congress' inaction. The Ninth Circuit has declined to relinquish this control.

The Ninth Circuit and respondents rely heavily on *United States v. Klein*, 80 U.S. (13 Wall.) 128. An issue in *Klein* was whether an individual who had formerly aided the Confederacy had adequately evidenced loyalty for the United States to qualify under the law for return of confiscated property. The individual had received a presidential pardon after declaring loyalty under oath. By a post-pardon enactment, however, Congress instructed the courts that receipt of a pardon was to be construed only as an admission of past acts of disloyalty and could not be used as evidence of present loyalty.

In response, this Court held in *Klein* that Congress could not determine the evidentiary value of executive pardons as it would violate the principle of the separation of powers. The Court ruled that the legislation forced the courts to find a certain way in cases and seriously undermined the autonomy of the judiciary.[4] In the Court's words, it was "forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and [was] directed to give it an effect precisely contrary." *Klein*, 80 U.S. (13 Wall.) at 147. The legislation passed by Congress at issue in *Klein* was far

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[4] There was also an issue of interference with executive authority. The executive alone grants pardons, and the Court believed that the Legislature was now attempting to devalue this authority by limiting the meaning of the pardons.

reaching and would dictate the outcome of all cases involving the controversial pardons.

The facts in *Robertson* are much more similar to those in *Pennsylvania v. Wheeling Bridge and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), where the Court had declared a certain bridge to be a nuisance and Congress subsequently passed a law declaring that the structure was legal. The Court wrote:

> "So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous Acts of Congress, they are to be regarded and modified in this subsequent legislation; and although it still may be an obstruction in fact, is not so in the contemplation of law." *Wheeling Bridge*, 59 U.S. (18 How.) at 430.

Likewise, the Compromise altered the legal status of the challenged policy and plans. Whereas there may have been doubt before as to whether or not they satisfied national environmental regulations, in light of Section 318 it was clear that they were now to be considered legally sufficient. The challenged congressional act in *Wheeling Bridge* was not directed at altering the Court's role in all future actions. Similarly, the Compromise simply provided that some Forest Service determinations for one fiscal year would be exempted from environmental regulations. As it did in *Wheeling Bridge*, Congress exercised its role and defined the legality of certain limited actions. Thus, under *Wheeling Bridge*, Congress' action was proper and constitutional.

In *Robertson*, however, the lower court places great stock on *Klein*. Yet, even within the Ninth Circuit other

panels have interpreted *Klein* in a different way. In *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir. 1987), the court reasoned that under *Klein* there would be an unconstitutional violation of the separation of powers principle only when "Congress . . . presumes to dictate 'how the court should decide an issue of fact (under threat of loss of jurisdiction)' and purports to 'bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds.' " *Atmospheric*, 820 F.2d at 992 (quoting *United States v. Brainer*, 691 F.2d 691, 695 (4th Cir. 1982)). Under this reading of *Klein*, even if Congress' actions are interpreted to require the court to make particular findings and are not an exemption or rewriting of previous legislation, Congress' actions are still constitutional unless the mandated findings are themselves constitutionally infirm. A congressional declaration of statutory sufficiency will not force the courts to make unconstitutional determinations.

In a stunning example of the legal contortions necessary to justify the holding in *Robertson*, the Ninth Circuit attempted to write off the two-prong test in *Atmospheric* as having been made disjunctive in *Grimesy v. Huff*, 876 F.2d 738 (9th Cir. 1989). *Robertson*, 914 F.2d at 1315. However, in actuality *Grimesy* upheld *Atmospheric*'s interpretation and used it to weaken the plaintiff's argument. The panel in *Grimesy* also noted that the plaintiff's position was further undermined by the newest edition of *Hart and Wechsler's The Federal Courts and the Federal System*. *Grimesy*, 876 F.2d at 745. The holding in *Grimesy*, despite what the *Robertson* court claims, goes even farther to support the holding in *Atmospheric* that two conditions

must be satisfied before Congress will be found to have violated the separation of powers.

Congress has the ultimate ability to author legislation and to manage federal lands. Therefore, to force a court to follow congressional determinations, even if it were an unwarranted order of mandatory fact finding, would not in and of itself result in manifestly unconstitutional decisions or orders. Thus, even under *Klein*, on which the Ninth Circuit relies most heavily, Section 318 is an appropriate and justifiable exercise of congressional ability.

B. The Same Court Which Decided Robertson Reached an Opposite Conclusion in Stop H-3 v. Dole, yet Stop H-3 Is the Better Reasoning and Should Have Been Followed Below

Confusion over the Ninth Circuit's reading of *Klein* and subsequent cases is heightened when *Stop H-3 Association v. Dole*, 870 F.2d 1419 (9th Cir. 1989), is considered. In an opinion decided by two of the same judges who wrote *Robertson*, the court upheld a congressional act which required the Secretary of Transportation to approve a construction project notwithstanding litigation challenging noncompliance with certain statutory environmental safeguards. There are few significant factual differences between this case and *Robertson* even though the same court reached opposite decisions. *Robertson* expressly asserted that actions directed and authorized by the Compromise were in compliance with the National Environmental Policy Act, the Migratory Bird Treaty Act, and the Federal Land Policy Management Act. This is no

different from *Stop H-3* where Congress excluded the project at issue from being subject to the regular environmental review considerations. In both cases, Congress specifically directed the respective actions to go forward and instructed that environmental laws which had been used and misused by opponents to stop governmental actions were no longer applicable to those actions.

Nevertheless, the Ninth Circuit held that Section 318 was unconstitutional, finding that it mandated certain factual findings. But Congress merely determined that, in light of Section 318, the statutory requirements for the cases pending were satisfied.

> "Congress, in enacting laws, may rest its policy decisions on 'factual' determinations, including determinations concerning the relationship of facts to preexisting law. Thus the . . . expression of its view that the H-3 project satisfied the requirements of the 4(f) statutes . . . does not represent 'adjudication' by Congress but rather the legitimate result of investigation and analysis upon which legislative decisions are based." *Stop H-3*, 870 F.2d at 1438.

In *Stop H-3* the Ninth Circuit also explained that the Legislature has the authority to overturn "judicial decisions which they feel are based on an interpretation of a statute . . . inconsistent with the intent of Congress when the law was passed." *Stop H-3*, 870 F.2d at 1429. It is only through the passage of new legislation that Congress can correct misinterpretations or distortions of previously passed laws. *See also Grimesy v. Huff*, 876 F.2d 738, where the Ninth Circuit allowed Congress to enact legislation correcting an agency's misinterpretation of a statute. In fact, the Ninth Circuit has determined that "we have

found no authority forbidding Congress in all instances from carving out a local exception to a national policy. To the contrary, many decisions approve of such action." *Stop H-3*, 870 F.2d at 1430. Unfortunately, in *Robertson* the Ninth Circuit forgot this principle and substituted its policy position for that of Congress.

C. The Implied Repeal Issue as Interpreted in Light of Tennessee Valley Authority v. Hill Does Not Apply to Section 318

The Ninth Circuit also tried to justify its finding of unconstitutionality by claiming that Section 318 could be read as an impermissible implied repeal. However, by following the principle of *Tennessee Valley Authority v. Hill* (*TVA*), 437 U.S. 153 (1978), such an interpretation should not be sustained.

In *TVA*, the Court refused to find an implied repeal of the Endangered Species Act (ESA) because the appropriations act in question did not explicitly refer to the ESA. The repeal could only be implied from the legislative history. There is no need to go to the legislative history of the Compromise to ascertain Congress' intent to effect a repeal. Here, the language of the Act makes the repeal crystal clear. The Act states in no ambiguous terms that the statutory requirements, which are the subject of the *Robertson* and *Lujan* controversies, have been met. Nevertheless, the Ninth Circuit held in *Portland Audubon Society v. Hodel*, 866 F.2d 302, that there could be "no express repeal without reference to the 'repealed' statute." *Id.* at 307. How presumptuous to claim that because Congress did not directly reference the statutes in question,

the obvious intent of the Legislature must be ignored. This is placing form over substance, diction over important public policy.

This Court need not resolve this question, however, as it is unnecessary, and probably inappropriate, to call the Compromise exemptions repeals. A repeal would have been necessary in *TVA* because the singular goal of the Endangered Species Act, to protect species from extinction at all costs, would have been thwarted. However, in *Robertson*, setting aside certain amounts of spotted owl habitat while opening up other land to timber management has satisfied the statutory goals of the legislation at issue. No *repeal* is needed; all that is being done is to create a time-specific, site-specific exemption from the express statutory requirements. Congress has presumed that after legislative debate and fact-finding, the purposes of that legislation have been adequately served.

Regardless of whether Section 318 is called an exemption, an exclusion, or a repeal, the intent of Congress should be respected and upheld. If the meaning and policy of Congress is clear, and the substance of what Congress has done is constitutional, the Court should not manufacture extremely literal readings of prior case law to avoid implementing policy it may find distasteful. In his *TVA* dissent, joined by Justice Powell, Justice Blackmun expressed similar fears: "With all due respect, I view this result as an extreme example of a literalist construction, not required by the language of the [Endangered Species] Act and adopted without regard to its manifest purpose." *TVA*, 437 U.S. at 202 (footnote omitted). If such an extreme literalist construction is avoided, the goals of the environmental regulations at issue in *Robertson* and *Lujan*

can be satisfied by the Compromise. The purpose of statutes such as the National Environmental Policy Act (NEPA) is to protect the environment by balancing conservation with other equally worthwhile goals. After lengthy debate in Congress, such a balance is necessarily present in the allocations of the Compromise.

D. The Ninth Circuit Abused Its Discretion by Finding That Section 318 Was Unconstitutional

Constitutional challenges are not to be considered lightly nor are constitutional violations to be easily found. Especially when passing on "an Act of Congress that confronts a deeply vexing national problem," a court should only find a provision unconstitutional for an extremely compelling reason. *Mistretta*, 488 U.S. at 384. "[F]ederal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and . . . when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988). While the Ninth Circuit may have sympathized with the Audubon Society or may have disagreed with Congress' delegations of land, the personal views of the judges are irrelevant. "A judge is also a voter, and it is in the polling booth that his moral views count." Bork, *The Tempting of America* at 125. The Ninth Circuit unfortunately lost sight of its role. While two lower courts were able to read this same act of Congress in ways that preserved its constitutionality, the Ninth Circuit stretched to do otherwise.

In *Mistretta*, this Court found that "petitioner's fears for the fundamental structural protections of the Constitution prove, at least in this case, to be 'more smoke than fire.' " *Mistretta*, 488 U.S. at 384. Similarly, Seattle Audubon Society's concerns for the integrity of the separation of powers principle are not well founded. The challenged congressional provision simply makes moot two pending cases. It does not permanently alter the structure of the federal system, nor does it establish a dangerous precedent as similar provisions will still be subject to the guidelines articulated in *Klein* and *Wheeling Bridge*.

What Congress' express determination of statutory adequacy attempts to do is protect its policy decision from meddling by the judiciary. Congress is using its power as a shield to protect its own integrity from further encroachments by the judiciary. The judiciary on the other hand, is using its power as a sword to carve out yet another role for judges to play in the formulation and implementation of policy. The Ninth Circuit is manipulating the Constitution to usurp Congress' function when historically "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality which will enable it to perform its function." *Panama Refining Company v. Ryan*, 293 U.S. 388, 421 (1935). To curb Congress' ability to moot these lawsuits would be to curb Congress' ability to insure that the laws it passes are followed and interpreted appropriately.[5]

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[5] The ability of Congress to change the law and to expect the new changes to be followed immediately is a (continued)

The Ninth Circuit should have exercised proper judicial restraint and should have shown some respect for congressional determinations. The Compromise is easily read as providing for case specific exemptions or exclusions to otherwise all-encompassing environmental legislation. To read it otherwise is to violate the clear principles of statutory construction laid out in *Mistretta*. More seriously, it advances the personality of the judiciary above the wishes of the people as articulated through Congress and it demeans the Constitution to nothing but a malleable document which can be interpreted in a myriad of ways to insure particular results.

II

IN THE ALTERNATIVE, EVEN IF CONGRESS HAS INTRUDED TO SOME DEGREE ON THE INTEGRITY OF THE JUDICIARY, THIS INTRUSION SHOULD BE BALANCED AGAINST THE GREATER HARM TO THE PRINCIPLE OF SEPARATION OF POWERS THAT WOULD OCCUR IF CONGRESS WERE NOT ABLE TO LIMIT JUDICIAL REVIEW

Assuming, for argument only, that it is possible to read Section 318 as constituting an intrusion on the rights and responsibilities of the judiciary, a constitutional violation still should not be found. Since the writing of the Constitution, there has never been any serious attempt to claim that the idea of the separation of powers was an

well-established tenet of American law. *See United States v. Schooner Peggy*, 5 U.S. (Cranch 1) 103, 109 (1801) (court must decide cases in accordance with the law existing at the time of the decision).

absolute system with clear limits and easily compartmentalized powers. In determining whether the Compromise violated the separation of powers, amicus submits that the Court should take a "pragmatic, flexible approach" in determining whether there was a separation of powers violation. *Nixon v. Administrator of General Services*, 433 U.S. 425, 442 (1977). In considering this issue, the Court should look at whether Section 318 will really have any long-term effect on the balance of power between these two branches.

Section 318 moots two cases. It does not attempt to bind the courts to similar findings in future cases. Nor does it say that the consolidated cases may not be maintained on other grounds. There will be no long-term alteration of judicial power. On the other hand, Section 318 insures that Congress will be allowed to carry out its constitutionally envisioned role of directing the management of the federal lands in a way most beneficial to the nation as a whole. Moreover, it is essential that Congress, not the courts, be allowed to shape federal land environmental policy. Only in the Legislature will representative accountability and thorough debate prompt decisions that reflect not only the will of the majority of the American people, but most importantly reflect a number of considerations including but not limited to environmental concerns.

A. Section 318 Merely Expands the Authority of Congress in Order To Allow It To Carry Out Its Constitutionally Authorized Function

"A considerable degree of congressional intervention . . . is constitutionally permissible if such intervention

is 'justified by an overriding need to promote objectives within the constitutional authority of Congress.' " *Brainer*, 691 F.2d at 698 (quoting *Nixon v. Administrator of General Services*, 433 U.S. at 443). As discussed above, the ability to regulate and manage national lands is clearly a congressional power. Furthermore, the overriding need for a coherent, legislatively formulated management plan for Pacific Northwest forest lands is apparent to all who have watched the shutdown of the lands to timber production and the resultant economic decline. These factors more than justify a minimal intrusion into the function and influence of the courts.

In other instances, Congress has gone as far, if not farther, to insure that its will is carried out. In *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), the Supreme Court upheld a congressional action that reopened cases which had already received final determinations in the courts. Congress authorized de novo judicial review of the issues and precluded the defenses of res judicata and collateral estoppel. In *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, Congress enacted legislation that made the government the sole defendant in actions for wrongful death or personal injury resulting from nuclear weapons testing programs. Essentially, Congress removed private manufacturers from the scope of the court's jurisdiction. This congressional action was also upheld. In *Touby v. United States*, 500 U.S. ___, 114 L. Ed. 2d 219 (1991), the Court upheld a congressional amendment to the Controlled Substances Act which allows the Attorney General to temporarily list drugs as controlled without having to comply immediately with the Administrative Procedure

Act. The Court recognized the importance of quick action in order to combat the scourge of designer drugs and also upheld the provision of the amendment that allowed for no judicial review of the temporary listings. While congressional acts are always subject to the review of their constitutionality, courts have wisely deferred certain powers to the Congress in matters that are of immediate national importance.

This deferral makes sense if the functions of judicial review are understood. Judicial review does not

> "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather then the former." *The Federalist No. 78* at 467-68 (A. Hamilton) (C. Rossiter ed. 1961).

It took a great deal of circuitous logic, explanations, and rewriting of case law for the Ninth Circuit to come up with a finding of unconstitutionality. This finding thwarts the very will of the people that the courts are supposed to protect.

The purpose of the judiciary is not to determine whether the Legislature acted appropriately. As the Supreme Court noted in *Tennessee Valley Authority v. Hill*:

> "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of

> review, nor are we vested with the power of veto. . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and public weal.' " *TVA*, 437 U.S. at 194-95.

Thus, apart from a finding of clear unconstitutionality, the courts have no further involvement with congressional enactments. Recognizing the inherent limits on judicial control over congressional enactments, Section 318 represents a most minimal intrusion on the judicial role.

B. The Judiciary's Intrusion on Congress' Land Management Abilities Is a Serious Violation of the Separation of Powers Doctrine and It Was Congress' Clear Intent That This Intrusion Be Avoided

Inherent in the idea of the separation of powers is the notion of the autonomy of the branches. Even in the Federalist papers though, the distinction between autonomy and insularity was recognized. Madison, in interpreting Montesquieu wrote:

> "[He] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. . . . His meaning . . . can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." *The Federalist No. 47*, at 302-03 (J. Madison) (C. Rossiter ed. 1961) (emphasis in original).

If the courts are allowed to invalidate appropriations measures, the courts are given the power of Congress. If the courts are allowed to determine what are appropriate uses of federal lands, the courts are given the power of Congress. If the courts are allowed to shape national environmental and economic policy by preventing logging and encouraging "at all costs" environmentalism, the courts are given the power of Congress.

Prior to the Compromise, Congress' ability to manage national lands was significantly undermined by judicial interference. The Court has the power to review acts of Congress for constitutionality. However, this grant of power was not intended to allow the federal courts to override congressional enactments by a mere mention of "unconstitutionality" absent a finding of a substantive constitutional violation. *See Mistretta* and *Beck, supra.*

The founding fathers envisioned a very limited role for the judiciary.[6] Certainly the federal courts were never supposed to author national policy. Finding constitutional infirmities in order to advance certain political or personal goals not only undermines the integrity and the appropriate function of the judiciary, but it forms poor

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[6] "The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatsoever. It may be truly said to have neither FORCE nor WILL but merely judgment. . . . [I]t can never attack with success either of the other two." *Federalist No. 78* at 465 (A. Hamilton).

precedent and disreputable case law. "[C]ourts must choose principles which they are willing to apply neutrally, apply, that is, to all cases that may fairly be said to fall within them. This is a safeguard against political judging." Bork, *The Tempting of America* at 146 (footnotes omitted). When comparing *Robertson* to other Ninth Circuit decisions, especially *Stop H-3*, it is hard to understand their differences on the substantive issues of law. This leads even the most charitable observer to conclude that the decisions in the cases differ not because of the legal issues involved but because of the results sought in each.

The Compromise represents Congress' frustration with judicial impediments to agency decisions. It also represents an attempt to deal on a national level with a divisive and disruptive issue, an issue that involves huge expanses of land and tens of thousands of jobs. Congress is interfering with judicial prerogative, if at all, in the most limited way and only to allow it to accomplish tasks set for it by the Constitution.

> " 'All the public lands of the nation are held in trust for the people of the whole country.' And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside land for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose." *Light v. United States*, 220 U.S. at 537 (citations omitted).

When the courts go beyond statutory interpretation and begin to create land management and environmental protection duties, they are managing the public trust in a way that was never envisioned by the founding fathers or by the holdings of this Court.

It may be that Congress has stepped on the toes of the judiciary. Or, it may be that Congress is simply drawing a proverbial line in the sand. Tired of judicial intervention, Congress is beginning to establish limits beyond which judicial activists are not allowed. Even if this is true, the fact still remains that the principle of separation of powers is not a concept with crystalline demarcations of acceptable or unacceptable intrusions. As is necessary so often in the law, equitable approximations must be made and, in this case, the balance falls on the side of Congress. Regardless of whether Congress overstepped its bounds, if the judiciary is allowed to control the management of national lands, as it has been attempting to do, the separation of powers ideal will be more greatly tarnished and more permanently undermined.

CONCLUSION

There is more at issue in this case than simply the enhanced protection of a threatened species. Also at issue is the economic and social stability of a region, the jobs of thousands, and now, the issue of the appropriate capacity of the judiciary. Congress has attempted to resolve the first issues fairly and sanely. However, the Ninth Circuit has placed its own policy resolves ahead of the long-term stability and effectiveness that a congressionally enacted

plan offers. It is up to this Court to determine what the appropriate role of the judiciary is. Amicus submits that courts exist not to create policy but to implement it; not to rewrite the will of the Legislature, but to insure that it is complied with. To allow the Ninth Circuit to so brazenly scorn not only legislative intent but the critical and sensitive nature of the issue at hand is to allow the federalist system to be hopelessly undermined.

Congress should be allowed to manage the federal lands without judicial intervention. This may mean that Congress will carve out exemptions to environmental policy from time to time. No one seriously doubts that Congress has this ability and the courts should not be permitted to use strained and stretched logic to find otherwise. Federal courts should not be allowed to use tenuous claims of unconstitutionality to undermine legitimate attempts by Congress to resolve issues of national importance. The constitutionality of congressional enactments should be preserved whenever possible. As demonstrated above, amicus submits that this Court has ample grounds to rule the Northwest Timber Compromise is a constitutional congressional enactment.

For the above reasons, Section 318 of the Northwest Timber Compromise should be upheld and the decision below reversed.

DATED: August, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN
*ROBIN L. RIVETT
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae
Pacific Legal Foundation

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October Term, 1991

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vs.

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Respondents.

On *Writ Of Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE OREGON LANDS COALITION AND THE WASHINGTON LANDS COALITION IN SUPPORT OF PETITIONERS

WILLIAM PERRY PENDLEY
Counsel of Record
TODD S. WELCH
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION, THE OREGON LANDS COALITION AND THE WASHINGTON LANDS COALITION

Mountain States Legal Foundation (MSLF) respectfully petitions to file the annexed brief *amici curiae* pursuant to Supreme Court Rule 37. The Solicitor General of the United States has given his consent to this *amici* brief. Defendants-Intervenors below have also given consent to MSLF for the filing of an *amici* brief. However, Respondents have denied consent.

IDENTITIES AND INTERESTS OF AMICI

Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation organized pursuant to the laws of the State of Colorado and dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government, and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state in the country. Large numbers of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in so-called environmental issues. In addition, MSLF is active on behalf of its members and the public interest in seeking an equitable balance between economic and environmental objectives in the management of the forests of the Pacific Northwest.

The interests of Petitioners and Respondents are with the impact of the decision below on each of them individually. MSLF believes that there are broader public policy concerns which will not be addressed adequately if the arguments set forth herein are not heard by this Honorable Court. It is not just a question of economics in the narrow sense or the meaning of the statute that is at issue in the instant case, but the impact of any decision on the lives of thousands, if not tens of thousands of men, women and children of the Pacific Northwest.

MSLF has participated in numerous cases before this Honorable Court as an *amicus* or as attorney for one of the parties or as an intervenor, most recently in *Lujan v.*

National Wildlife Federation, 497 U.S. ___, 111 L.Ed.2d 695 (1990) and *Mountain States Legal Foundation v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 775 (1990).

The Oregon Lands Coalition (OLC) is a non-profit organization founded on August 31, 1989, by eleven community-based, grassroots, timber organizations. The OLC now unites 51 member groups, representing nearly 75,000 families committed to "the need for balance of resource production and resource protection."

The Washington Lands Coalition (WLC) is a non-profit, grassroots organization dedicated to the principles of balance in the use and conservation of natural resources. WLC currently represents 27 groups with a total membership of over 17,000, made up primarily of independent loggers.

The Oregon Lands Coalition and the Washington Lands Coalition represent the views of hundreds of thousands of men and women of the Pacific Northwest, men and women whose lives will be devastated further should the decision below be upheld. While the present parties represent important economic, environmental and constitutional views, none can speak to the critical social issues brought forward by the Oregon Lands Coalition and the Washington Lands Coalition through their counsel, Mountain States Legal Foundation. These views will further aid this Honorable Court in deciding the instant matter.

For the foregoing reasons, Mountain States Legal Foundation, the Oregon Lands Coalition and the Washington Lands Coalition request that this motion to file the annexed brief of *amici curiae* be granted.

DATED: August 23, 1991.

Respectfully submitted,

WILLIAM PERRY PENDLEY
Counsel of Record
TODD S. WELCH
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

By _____
WILLIAM PERRY PENDLEY

Attorneys for Amici Curiae
Mountain States Legal Foundation
The Oregon Lands Coalition
The Washington Lands Coalition

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No. 90-1596

In The

Supreme Court of the United States

October Term, 1991

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUAL LUJAN, JR., SECRETARY OF THE INTERIOR,

Petitioners,

vs.

SEATTLE AUDUBON SOCIETY, *ET AL.*,

Respondents.

On *Writ Of Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE OREGON LANDS COALITION AND THE WASHINGTON LANDS COALITION

IDENTITIES AND INTERESTS OF AMICI

The identities and interests of *amici curiae* are set forth in the preceding motion and are adopted herein.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Seattle Audubon Society v. Robertson*, (*Robertson*) 914 F.2d 1311 (9th Cir. 1990).

INTRODUCTION

Since the adoption of the Endangered Species Act in 1973, no solitary issue has so focused the attention of the nation on the single-mindedness of that statute and its often Draconian results – "whatever the cost," *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) – as has the controversy in the Pacific Northwest over the Northern Spotted Owl.

For it is there that the allegedly threatened status of the Northern Spotted Owl and the concomitant federal protection plan may well result in the loss of as many as 97,590 jobs in Washington, Oregon and California.[1] Approximately half of that loss will be direct timber jobs and the remainder will be in occupations dependent upon the timber industry.

These devastating figures are rendered even more disastrous by the realization that they will not be spread evenly throughout the tri-state area, or even occur primarily in the larger metropolitan areas. Instead, the impact will be imposed upon small communities where timber harvesting – particularly on the federal lands

[1] Lippke, B., "Three-State Impact of Spotted Owl Conservation and Other Timber Harvest Reductions," September 1990, p. 27.

which predominate in many rural counties – is the major economic activity. For those communities, job losses on such a scale will mean the death of entire towns.[2]

With those communities will go not just unique elements of Americana which all Americans revere, but jobs; federal, state and local taxes; millions of dollars from the sale of federal timber resources – twenty-five percent of which is returned to local communities for education;[3] millions of dollars from the sale of private and state-owned timber;[4] and much needed weight on the positive side of the nation's balance of trade.[5]

---

[2] The National Association of Counties (NACo), which represents the elected officials of the nation's 3,000 counties, last year declared Mill City, Oregon, an endangered community due to the Northern Spotted Owl controversy.

Lippke reports that "most of this decline will occur in rural communities[,]" and that "[t]he market value of home assets in timber-dependent communities could decline by as much as $3.5 billion, based on the midrange estimate of harvest reductions." *supra*, p. 2. Obviously, larger cut backs will be even more devastating. This reduction in property values will not only reduce the mobility of unemployed workers, but will further reduce revenues from property taxes.

[3] "Federal forest payments and severance taxes which provide receipts for local governments . . . . may be reduced by more than $100 million." Lippke, B., *supra*, p. 2.

[4] U.S. Fish and Wildlife Service officials have testified that implementation of the Endangered Species Act, as it applies to the Northern Spotted Owl, will prevent the harvesting of private and state-owned timber resources. As much as a billion board feet of such timber, worth $350 million, will be placed off limits with a resultant loss of 17,000 jobs. Lippke, B. *supra*, p. 26.

[5] "Since the product demand is not reduced but merely shifted to other suppliers, this capacity would, over time, be

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While losing such benefits, the Pacific Northwest and the nation will be burdened further with increased unemployment compensation; greater dependence upon foreign sources for wood products; ever escalating costs for timber products -- putting the dream of home ownership out of the reach of hundreds of thousands of Americans;[6] compensation paid to private landowners for unconstitutional "takings;"[7] and the incalculable costs of increased rates of divorce, suicide and spousal and child abuse.[8]

(Continued from previous page)

replaced by foreign suppliers at a cost of $4.3 billion." Lippke, B., *supra*, p. 3.

[6] The National Home Builders Association reported that a 20% increase in the price of wood products puts home ownership out of the reach of 65,000 American families. According to *Random Lengths*, a publication which tracks timber prices, framing lumber prices increased more than 50% in the four months following February 1, 1991.

[7] The natural and proper result of the decisions of this Honorable Court in *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), give a frightening glimmer of the future costs to the nation of "takings" under the Endangered Species Act: *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) ($2.658 million for taking 12.5 acres); *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989) ($60.296 million, plus prejudgment interest from August 3, 1977, for taking 1,327 acres).

[8] Lee, G., Ph.D., Professor of Forest Resources, University of Washington, Testimony Prepared for a Hearing of the Committee on Commerce and Labor of the Washington State House of Representatives, submitted on June 14, 1990. Dr. Lee attributes the massive emotional blow to timber workers, timber families and timber communities to four factors: (1) job loss; (2) loss of trust in government-assured wood supplies; (3)

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It was in the context of this looming regional disaster, and national tragedy, that the United States Congress

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conflict of entrepreneurial and collective values; and (4) dehumanization through the public degrading of timber occupations.

See, also, Lippke, B., *supra*, p. 3.

United States Senator Slade Gorton put it this way:

> Let us now look at some of the brutal human consequences of spotted owl protection now becoming apparent. Real working people are suffering. They are living and even dying in pain and grief. I do not exaggerate. The *Seattle Post-Intelligencer* reported yesterday from Forks, the very same small town that is now part of spotted owl "critical habitat."
>
> Here are the cold facts. The number of victims of domestic violence in Forks has jumped 45% this year. The community's mental health center has seen an increase of 22% in its case load. The number of juveniles charged with assault in Clallam County has increased 148%. Welfare grants for single-parent households in Forks increased 137% and food stamp grants increased 27%, *in just one month*. The children at Forks Elementary School are in extreme danger. Last month, two children made serious attempts at suicide. The counselor at that school says her children are "just burnt out and crying for no reason. They don't know if they are staying or going. They don't know if they are leaving home, leaving their roots. All the kids are talking about it, and they are scared. The anger – it is incredible. We have had kids in the office who have never been there before. Kids hurting other kids, breaking things, cursing."

137 Cong. Rec. §8630 (daily ed. June 25, 1991.) (Emphasis in original.)

stepped in and adopted, in the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub.-L. No. 101-121, Tit. III. §318(b)(6)(A), 103 Stat. 747 (1989), the so-called Northwest Timber Compromise (Compromise).[9] Now that Compromise is being challenged as contrary to the Constitution.

Respondents and their ilk, whose mantra – since the adoption of the Endangered Species Act and its command to "use . . . all methods and procedures which are necessary" to preserve endangered species – has been "will of Congress," "will of Congress," "will of Congress," now ask this Honorable Court to brush aside the clearly stated will of Congress, and to substitute instead the views of a three member panel of the Ninth Circuit Court of Appeals.[10]

---

[9] The recognition of the national importance of the growing crisis in the Pacific Northwest is revealed by the fact that the Compromise was adopted notwithstanding the fact that only four of one hundred Senators and thirteen of four hundred thirty-five Members of Congress are from Washington and Oregon.

[10] In so doing, Respondents seek to enjoy the benefits of those aspects of the Compromise which they favor, while ridding themselves of the burdens which were the *quid pro quo* for the Compromise adopted by Congress. As a matter of equity and good public policy, such conduct is impermissible:

> Parties are not only bound to act fairly in their dealings with each other, but they are not to expect the aid of a court of equity to enforce an agreement made with the intent that it shall operate inequitably or as a fraud on the private rights and interests of third persons or on the public generally. Thus, the

(Continued on following page)

The Compromise adopted by Congress was simple and straight forward. Its objective could not have been more clear: to ensure a proper balance between preserving the economic viability of the Pacific Northwest and protecting the Northern Spotted Owl. An essential component of that Compromise was Section 318 – the provision at issue herein – in which Congress adopted specific and legal exemptions to various environmental and public lands statutes.

Congress, as a matter of legislative shorthand – while still expressing its very clear intent – chose not to refer to the multitude of statutory challenges lodged by Respondents, but instead referred to the cases themselves.[11] Despite such clearly permissible legislative shorthand, what the Congress did remains clear, it changed federal law.

Unfortunately, to this clear and legitimate expression of Congressional intent, a panel of the Ninth Circuit Court of Appeals turned a blind eye. The panel not only substituted its own view of what should be taking place in the Pacific Northwest for the public policy set forth by Congress, but in so doing committed numerous errors which require reversal by this Honorable Court.

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requirements of public policy will be considered in determining the applicability of the maxim.

27 Am Jur 2d Equity §136, p. 668.

[11] The complaints and amended complaints filed in the matter below comprise 81 pages. It is little wonder that Congress chose not to address each of the allegations of Respondents.

The panel violated the most rudimentary principle of statutory construction, that is, if possible, an act of Congress must be read so as to preserve its constitutionality. Furthermore, the panel wavered in its adherence to the Constitution, when, by its decision, it robbed the Congress of its authority over the management of the public lands.

Mountain States Legal Foundation, the Oregon Lands Coalition and the Washington Lands Coalition submit that the action of Congress, in adopting the Compromise, was constitutional and that the decision below should be reversed.

ARGUMENT

I. THE PANEL OF THE NINTH CIRCUIT COURT OF APPEALS COMMITTED ERROR BY FAILING TO INTERPRET SECTION 318 SO AS TO UPHOLD ITS CONSTITUTIONALITY.

The most fundamental and basic tenet of constitutional law is that:

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court *will construe* the statute to avoid such problems unless such construction is *plainly contrary* to the intent of Congress.

DeBartolo v. Fla. Gulf Coast Tr. Coun., 485 U.S. 568, 575, (1988). (Emphasis added.) Likewise,

> It is of course true that federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and that when faced with

> such doubts the Court will first determine whether it is fairly *possible* to interpret the statute in a manner that renders it constitutionally valid.

Communications Workers v. Beck, 487 U.S. 735, 762 (1988). (Emphasis added.)

Incredibly, the panel below, while citing *Beck*, declined to uphold the constitutionality of Section 318 because it could not do so "fairly." *Robertson*, at 1317. Thus, the panel disingenuously ignored the operative word in *Beck* which is not "fairly" but "possible." In so doing, the panel ignored the clear intent of Congress to change, for the purposes of the timber harvest directed during fiscal year 1990, applicable environmental and public lands statutes.

The panel's reliance upon the decision of this Honorable Court in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), could not be more misplaced. In *TVA*, the respondent argued, unsuccessfully, that the appropriations statute, by implication, expressed the intent of Congress to complete the Tellico Project notwithstanding the Endangered Species Act. Unlike *TVA*, Congressional intent in the instant case could not be more clear. Congress intended that certain timber harvesting goals were to be met notwithstanding the numerous and varied environmental and public lands statutes listed in Respondents' lawsuits.

It is not merely "possible" to interpret Section 318 of the Compromise as constitutional, but, as the panel has demonstrated by its awkward and myopic reading of the case law, almost impossible not to.

II. THE PANEL OF THE NINTH CIRCUIT COURT OF APPEALS COMMITTED ERROR BY USURPING THE CONSTITUTIONAL POWER OF CONGRESS TO MANAGE THE PUBLIC LANDS.

While espousing a faithful adherence to the commands of the Constitution, the panel below failed to give full meaning to the Property Clause. As this Honorable Court has held:

> The power over the public lands thus intrusted to Congress is without limitation. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." *Light v. United States*, 220 U.S. 523, 537 (1911) Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its view of public policy.

United States v. San Francisco, 310 U.S. 16, 29-30 (1940).

More recently, this Honorable Court held:

> And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that "[t]he power over the public land thus entrusted to Congress is without limitation."

Kleppe v. New Mexico, 426 U.S. 529, 539 (1976). *California Coastal Commission v. Granite Rock*, 480 U.S. 572, 580 (1987).

Were this Honorable Court to permit the decision below to stand, it would be the first ever limitation on the power of Congress over public land. This is a backward step which the Constitution does not permit.

III. THE PANEL OF THE NINTH CIRCUIT COURT OF APPEALS COMMITTED ERROR BY ITS MISAPPLICATION OF THE DECISION OF THIS HONORABLE COURT IN *KLEIN v. UNITED STATES* AND ITS FAILURE TO APPLY *PENNSYLVANIA v. THE WHEELING AND BELMONT BRIDGE CO.*

In another twisted bit of logic, the panel below ignored the case most directly applicable to the Compromise adopted by Congress, *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), and instead embraced *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). While acknowledging that *Wheeling* holds that "Congress can amend or repeal any law, even for the purposes of ending pending litigation," *Robertson*, at 1315, the panel concluded that Congress had not sought to amend or repeal existing law. Once again, it appears the panel's holding was founded on Congress' use of legislative shorthand rather than some magic phrase to the liking of the panel.

By relying on *Klein*, the panel also ignored the Ninth Circuit's own holding in *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir. 1987), in which the court adhered to a two-prong test. The panel is flatly in error when it concluded that *Grimesy v. Huff*, 876 F.2d 738 (9th Cir. 1989) abandoned either element of that test.

The holding of this Honorable Court in *Klein* is a most slender reed upon which to support a decision declaring an act of Congress unconstitutional. This is particularly the case when that slender reed is balanced precariously atop an even more slender reed, that is, the

view of the panel below that the intent of Congress cannot be discerned because Congress did not use the words "repeal" or "amend."

IV. THE PANEL OF THE NINTH CIRCUIT COURT OF APPEALS COMMITTED ERROR BY ITS FAILURE TO APPLY ITS EARLIER RULING IN *STOP H-3 ASSOCIATION v. DOLE*.

The distinction the panel below drew between its earlier decision in *Stop H-3 Association v. Dole*, 870 F.2d 1419 (9th Cir. 1989) and the instant decision strains credulity. In *Stop H-3*, an appropriations bill directed the Secretary of Transportation to build a highway – the subject of on-going litigation – notwithstanding various environmental statutes. Contrary to the language used by the panel below, Congress did not specifically "withdr[a]w" the "statutory environmental protection provisions underlying the ongoing litigation as to the challenged project." *Robertson* at 1316. In fact, what Congress did in *Stop H-3*, was exactly what it did in adopting the Compromise at issue here.

In *Stop H-3*, the Congress directed the Secretary of Transportation to approve construction of the highway, "notwithstanding" certain named environmental statutes. In the Compromise at issue here, Congress directed the federal agencies involved to harvest timber notwithstanding the statutes challenged by Respondents in their lawsuits. It is of little moment that Congress, in adopting

Section 318, referenced the statutes in question, not by name, but by their presence in litigation.[12]

---

[12] Had Congress enumerated the statutes to be "amended" or "repealed" by Section 318, it is altogether likely that, in light of the 81 pages of complaints and amended complaints filed by Respondents, Congress would have overlooked some minor, alleged statutory violation. One has little doubt, given Respondents' proclivities, that a lawsuit would have ensued in which Respondents would have sought to frustrate the will of Congress.

A case in point is the attempt of Congress to ensure the construction of a $240 million observatory atop Mount Graham in south eastern Arizona. In order to ensure the construction of the first three telescopes in the project, Congress adopted the Idaho-Arizona Conservation Act, in which it concluded that the requirements of the Endangered Species Act had been met. The intent of Congress could not have been more clear. As U.S. Senator John McCain stated:

> If the Senate and House approve this amendment and the President signs the bill, we will be taking a new step into discovering more about ourselves, our world, and its beginnings. Three telescopes *will be built immediately. They can no longer be stalled by process, by litigation, or by whim.*

134 Cong. Rec. S15741 (daily ed. Oct. 13, 1988) (Emphasis added). Senator McCain was wrong. The project has been stopped by litigation filed by several environmental organizations, *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991).

CONCLUSION

The tragedy now ongoing in the Pacific Northwest is one of epic proportions. Its proper and equitable resolution will take months, if not years. However, with the adoption of the Northwest Timber Compromise, Congress began the process of balancing the needs of the American people for a strong, vibrant economy and a healthy environment.

The effort of Congress to achieve that golden mean must not be frustrated by the narrow self interest set forth by Respondents or by the purblind approach to Congressional action adopted by the Ninth Circuit Court of Appeals.

For the above reasons, Section 318 of the Northwest Timber Compromise should be upheld and the decision below reversed.

DATED: August, 1991.

Respectfully submitted,

WILLIAM PERRY PENDLEY
Counsel of Record
TODD S. WELCH
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

Attorneys for Amici Curiae
Mountain States Legal Foundation
The Oregon Lands Coalition
The Washington Lands Coalition

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IN THE
Supreme Court of the United States
October Term, 1991

F. Dale Robertson, Chief, United States Forest Service, The United States Forest Service, and Manuel Lujan, Jr., Secretary of the Interior,

Petitioners,

v.

Seattle Audubon Society, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE*

ROBERT A. BUTTERWORTH
Attorney General

JONATHAN GLOGAU
Assistant Attorney General
Counsel of Record

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-4830

COUNSEL FOR AMICI CURIAE

*The states joining in this brief are listed on inside front cover

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LISTING OF STATE ATTORNEYS GENERAL JOINING IN THIS BRIEF

HUBERT H. HUMPHREY, III
Attorney General
State of Minnnesota

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

WINSTON BRYANT
Attorney General
State of Arkansas

DAN MORALES
Attorney General
State of Texas

MIKE MOORE
Attorney General
State of Mississippi

MICHAEL E. CARPENTER
Attorney General
State of Maine

ROBERT J. DEL TUFO
Attorney General
State of New Jersey

LEE FISHER
Attorney General
State of Ohio

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

GRANT WOODS
Attorney General
State of Arizona

NICHOLAS J. SPAETH
Attorney General
State of North Dakota

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2A J. Sutherland, *Statutes and Statutory Construction,* § 4606 (C. Sands 4th ed. 1984) 7

7 C. Cannon, *Precedents of the House of Representatives,* §§ 1172 *et seq.* (1936) 23

D. Watson, *The Constitution of the United States: Its History, Application, and Construction* (1910) . . 2

Fisher, *Budgets, Concepts and Terminology: The Appropriations Phase,* in 1 *Studies in Taxation, Public Finance and Related Subjects - A Compendium,* 437 (Fund for Public Policy Research 1977) 23

M. Axline, *Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases,* 12 Harv. Envt'l L. Rev. 1, 11, note 33 (1988) . . 21

Memorandum of John R. Bolton, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs, to Representative John D. Dingell, Chairman, Subcommittee on Oversights and Investigations (1985) 21

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No. 90-1596

IN THE
Supreme Court of the United States
October Term, 1991

F. Dale Robertson, Chief, United States Forest Service, The United States Forest Service, and Manuel Lujan, Jr., Secretary of the Interior,

Petitioners,

v.

Seattle Audubon Society, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF INTEREST OF AMICI CURIAE

Amici, the states of Florida, Texas, Minnesota, Arkansas, Nevada, Mississippi, Maine, New Jersey, Ohio, Connecticut, North Dakota, and Arizona, have a fundamental interest in the outcome of this case. States represent their residents' interests in federal court across a broad spectrum of social issues, including but not limited to environmental issues involving federal agencies. If special interests unable to garner the votes to amend legislation are nevertheless allowed to push through provisions that dictate how the courts are to apply existing laws in the context of particular facts

in pending cases, states will no longer be able to rely on the independence and objectivity of the federal courts in cases where the states are attempting to protect their residents' interests. When Congressional action threatens the courts' Article III powers, therefore, as it has in the instant case, the sovereign interests of the states are also threatened. Quite apart from the merits of the underlying litigation in this case, or even the survival of the northern spotted owl as a species, the states are concerned with the precedent of Congress invading the decisionmaking process in cases pending before the federal judiciary, and dictating the outcome in those cases.

Amici states have a profound interest in the proper allocation of judicial, legislative, and executive powers among the three branches of the federal government. This interest dates back to the formation of the Constitution, where states unhappy with the Articles of Confederation argued for an independent judiciary capable of addressing excesses by the legislative and executive branches of federal government.[1] The interest of the states in an independent judiciary is as vital today as it was at the time the Constitution was written.

Amici urge the Court to affirm the decision of the court of appeals that § 318(b)(6)(A) violates the Constitution's separation of powers. Although Congress has broad powers

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1 "It was no doubt the experience of the members of the Convention arising from the limited judicial system under the Articles that caused a unanimous demand for a separate, independent and supreme judicial tribunal." D. Watson, *The Constitution of the United States: Its History, Application, and Construction* (1910). In fact, the Constitutions of several states served as the model for an independent federal judiciary. As Alexander Hamilton noted: "These considerations teach us to applaud the wisdom of those States who have committed the judicial power in the last resort, not to a part of the Legislature, but to distinct and independent bodies of men." *The Federalist* No. 81.

to legislate, and to determine the size and reach of the federal judiciary, those powers must be restricted when they are used to dictate the outcome in particular pending cases.

SUMMARY OF ARGUMENT

1. Although statutes should be read where possible to avoid constitutional issues, "this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication...." *Commodity Futures Trading Comm'n. v. Schor,* 478 U.S. 833, 841 (1986). Petitioners urge the Court to adopt an interpretation of § 318(b)(6)(A) that would avoid a constitutional issue, but which ignores the "legislative will" behind § 318(b)(6)(A). Section 318(b)(6)(A) was intended to, and did in fact, dictate a particular result in two pending cases identified by name and docket number in the statute itself. That is a core judicial function reserved to the judicial branch of government by Article III, § 1, of the United States Constitution.

Petitioners' argument that § 318(b)(6)(A) should be read as amending the laws at issue in the cases it identifies, rather than directing an outcome in those cases, fails to identify any language in § 318(b)(6)(A) stating or implying that Congress intended to amend any existing laws. To the contrary, Congress said in § 318(b)(6)(A) that specified agency action was "adequate consideration for the purpose of *meeting* the statutory requirements that are the basis for [these cases]." Rather than repealing or modifying the underlying environmental statutes, this language assumes that "the statutory requirements" *are* in place, and determines what action will meet the requirements of these laws.

This straightforward reading is confirmed by the legislative history of § 318. The conference committee report specifically states that § 318 "in no way alters application of the Endangered Species Act or other environmental laws to

Forest Service and BLM management activities." H.R. Conf. Rep. No 264, 101st Cong., 1st Sess. 89. The genesis of § 318(b)(6)(A), and the specific direction in that section that the laws at issue in these two cases have received "adequate consideration," reveals that § 318(b)(6)(A) was not concerned with the general legal significance of particular facts, but rather was concerned with the outcome in the identified cases. In this respect, this case is identical to *United States v. Klein*, 80 U.S. (13 Wall) 128 (1872), in which this Court found that a statute "deeming" a presidential pardon to be conclusive evidence of disloyalty was an unconstitutional legislative attempt to dictate a result in pending cases.

2. Congress may not constitutionally exercise functions that are at the core of the power allocated to the judiciary by Article III of the United States Constitution. No power is more central to the judicial function than the power to apply the law to specific facts in the context of particular cases. Section 318(b)(6)(A) represents an attempt by Congress to exercise this judicial power by determining how the law is to be applied to the facts in these cases.

Petitioners' attempts to limit *Klein* to circumstances in which Congress has precluded Article III review of invasions of separate constitutional rights is without merit. No such "separate" constitutional right was involved in *Klein*, and no subsequent jurisprudence of this Court suggests that a direct threat to the independence of Article III courts is unreviewable unless it is coupled with some other constitutional transgression. Under both *Klein* and the more contemporary Article III analysis set forth in *Schor, supra*, Congress' attempt to decided these pending cases violated the Constitution's separation of powers.

ARGUMENT

I. SECTION 318(b)(6)(A) DOES NOT AMEND ANY LAWS, BUT RATHER DICTATES AN OUTCOME IN PENDING LITIGATION

The petitioners do not waste time arguing that Congress may constitutionally decide pending cases. Rather, petitioners devote the majority of their brief to arguing that § 318(b)(6)(A) simply amended the laws at issue in the cases specified in § 318(b)(6)(A). Although the language of § 318(b)(6)(A) does not expressly purport to amend any laws, petitioners deduce an intent to amend from the statement:

> Congress hereby determines and directs that management of areas according to subsections (b) (3) and (b) (5) of this section...is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.[2]

Petitioners' inventive interpretation is contrary to the language of the section, its legislative history, and indeed its very purpose.

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2 The "Statutory requirements" at issue in the identified cases are the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 *et seq.*; the National Forest Management Act (NFMA), 16 U.S.C. § 1600 *et seq.*; the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703; the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1701 *et seq.*; and the Oregon and California Lands Act (OCLA), 43 U.S.C. 1181(a).

A. The Plain Language of § 318(b)(6)(A) Reveals That Congress Did Not Intend That Provision To Repeal Existing Laws

"'Although [the] Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute...' or judicially rewriting it."

Apetheker v. Secretary of State, 378 U.S. 500, 515 (1964) (*quoting Scales v. United States,* 367 U.S. 203, 211 (1961)). *See also Moore Ice Cream Co. v. Rose,* 289 U.S. 373, 379 (1933) (statutory construction should not be pressed "to the point of disingenuous evasion to avoid a constitutional question."). As the Court recently observed in *Northern Pipeline Co. v. Marathon Pipeline Co.,* 458 U.S. 50, 86 (1982), Congress may not itself exercise Article III powers "behind the facade of a grant to the district courts...."

Petitioners argue that § 318(b)(6)(A) was "*intended* to establish the procedures that would govern timber sales on a one-year basis and on specified public lands, and...Congress *intended* that these procedures would not be impeded or modified by the applicability of other environmental statutes." Petitioner's brief at 20 (emphasis added). Petitioners invocation of congressional intent is surprisingly devoid of any *analysis* of congressional intent, and in fact is contradicted by the plain language of § 318(b)(6)(A). Section 318(b)(6)(A) does *not* expressly mention amending any existing legislation. Rather, it affirmatively refers to existing "statutory requirements" and determines that specified agency actions will constitute "adequate consideration for *meeting* the statutory requirements...."

(Emphasis added.) If the statutory requirements had been amended, there would have been no need to meet them.[3]

In addition to disproving the petitioners' argument that § 318(b)(6)(A) was intended to amend existing laws, the plain language of § 318(b)(6)(A) reveals that Congress *did* intend to direct a particular outcome in these consolidated cases. Section 318 specifically refers to "the consolidated cases captioned Seattle Audubon Society, et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc., et al., v. F. Dale Robertson, Civil No. 89-99 (*order granting preliminary injunction*) and the case of Portland Audubon Society, et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR" (emphasis added). If the identification of these specific cases were simply a shorthand method of identifying the statutes that Congress intended to amend, as petitioners suggest, there would have been no need to also specifically identify the "order granting preliminary injunction." The *only* reason for specifically identifying the order granting preliminary injunction was to remove any doubt that Congress intended its finding to replace those of the

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3 Petitioners acknowledge that repeals by implication are not favored, but argue that the rule does not apply when an exemption for a federal project "could be found in the text enacted into law." Petitioners' brief at 33, note 27. This Court, however, has never adopted a "could be found in the text" exception to the rule against implied repeals. If it is clear from the text of a statute that Congress intends to modify existing laws with respect to a particular project, then it is not necessary to imply an intent to repeal. If, however, as is the case with 318(b)(6)(A), the language of the statute is clear and it is necessary to impute to Congress an intent to repeal or amend underlying laws, then the canon of construction against implied repeals applies with full vigor. Any "speculation" about the intent of § 318 is only the result of petitioners' labors. There is in fact no doubt that Congress did *not* intend § 318 to amend any existing laws.

court in the "order granting preliminary injunction."[4] Plainly, Congress intended to direct a decision in favor of the government in these pending cases, but without amending any of the laws at issue in the cases.

B. The Legislative History of § 318(b)(6)(A) Confirms That It Was Not Intended to Amend Existing Laws, But Rather Was Directed At Pending Cases

The legislative history of § 318(b)(6)(A) confirms that it was directed at pending litigation, rather than at preexisting legislation. The Conference Report on § 318(b)(6)(A) specifically states that § 318 "in no way alters application of the Endangered Species Act or other environmental laws to Forest Service and BLM management activities." H.R. Conf. Rep. No 264, 101st Cong., 1st Sess. 89, (reproduced at Appendix F to Respondents' Brief in Opposition To Petition For Certiorari, at 122a.[5] This language was obviously

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4 Neither Petitioners nor their supporting amici address this reference in § 318(b)(6)(A) to the "order granting preliminary injunction." It is a cardinal rule of statutory construction, however, that statutes will be construed whenever possible to give meaning to each word. *See* 2A J. Sutherland, *Statutes and Statutory Construction*, 46.06 (C.Sands 4th ed. 1984); *American Stores Co. v. American Stores Retirement Plan*, 928 F.2d 986, 990 (10th Cir. 1991). The only plausible meaning of this language is that the "direction" given in § 318(b)(6)(A) is targeted to the courts in the named cases.

5 Petitioners address this legislative history only in a confusing footnote, where they argue that § 318(b)(6)(A) does not "preclude further judicial challenge to the adequacy of preexisting administrative documents." Petitioners' Brief at 30, n.22. That does not change the fact that Congress left the environmental laws at issue in the litigation in place, while at the same time determining that defendants' action during fiscal year 1990 would satisfy those laws. An exercise of judicial power by the legislative branch is no less a violation of the separation of powers because the violation will last for a limited period.

intended to reassure those members of Congress concerned with "application of...environmental laws to Forest Service and BLM management activities" that § 318 did not attempt to alter those laws, out of fear that an attempt to amend the laws could not garner the votes necessary for passage.[6]

Other members of Congress clearly *were* opposed to any attempt to amend the underlying laws. Over 100 members of the House of Representatives signed a letter opposing any such amendment. *See* Appendix B to the brief of Respondents. Following the publication of this letter, the Conference Committee rejected Senate language that *would have* amended the legislation at issue in these consolidated cases,[7] and instead adopted § 318(b)(6)(A). The Conference Committee then assured members of Congress that § 318(b)(6)(A) "in no way" amended existing legislation.

The legislative history of § 318 not only confirms that it was not intended to amend existing laws — it also confirms

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6 This legislative history resolves any ambiguity that might be present in the language of § 318(b)(6)(A). As this Court has recently noted, Congress may not "evade the 'carefully crafted' constraints of the Constitution..." by attempting to do indirectly what it may not do directly. *Metropolitan Washington Airport Authority v. Citizens for the Abatement of Aircraft Noise*, 111 S. Ct. 2298, 2308 (1991).

7 *See* S. Rep. No. 101-85, 101st Cong. 1st Sess. (July 25, 1989) (requiring that specified timber sales be awarded and operated "notwithstanding any provision of law that is the basis for any stay, restraining order or injunction issued in [these cases]."). This language would have amended the underlying laws for purposes of the specified sales. *See e.g., Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (law stating that bridges were lawful structures, "anything in any law or laws of the United States to the contrary notwithstanding," amended preexisting laws). Petitioners argue that Congress is entitled to change substantive laws while litigation is pending, and courts must apply the law as it stands at the time of decision. *See* Petitioners' brief at 44. While this is true, it does not aid petitioners' argument unless the Court first concludes that Congress *did* alter existing laws — a conclusion plainly at odds with the language and legislative history of § 318(b)(6)(A).

that § 318(b)(6)(A) *was* directed at the cases not before the Court. The purpose of § 318(b)(6)(A) was, as petitioners concede, to "avert a looming crisis." Petitioners' brief at 17. In fact, the conference report on § 318 reveals:

> The managers have agreed to this provision *because* a large portion of the Forest Service's and Bureau of Land Management's (BLM) fiscal year 1989 timber sale programs...have been interrupted due to legal challenges....

H.R. Conf. Rep. No 264, 101st Cong., 1st Sess. 89, (reproduced at Appendix F to Respondents' Brief in Opposition to Petition for Certiorari, at 117a (emphasis added).

The "looming crisis" that § 318(b)(6)(A) was intended to avert was therefore created *by the very litigation that petitioners now claim is irrelevant to § 318.* This fundamental fact is obscured by petitioners' segmentation of the language of § 318(b)(6)(A), but it is pivotal in determining what Congress was attempting to do by adopting § 318. The fact that § 318 was adopted to address the "crisis" created by this litigation directly supports the conclusion that Congress' naming the specific case titles, docket numbers, and even then-current judicial orders was not merely a convenient shorthand method of identifying statutes that Congress intended to amend, but rather was a Congressional effort to resolve the cases creating the "crisis."[8]

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8 As the Senate Report stated, § 318 was necessary because of "the interdiction of nearly 60 percent of the timber sales from public lands in Oregon and Washington...as a result of court actions filed in U.S. district courts...the Committee's immediate concern is the potential of considerable economic disruptions...if the injunctions remain in place." S. Rep. No. 101-85, 101st Cong. 1st Sess. at 120 (July 25, 1989).

The Conference Committee Report states, with respect to 12 sites specifically designated in subsection (b)(5) of § 318: "This expanded reservation of areas for spotted owls again is deemed adequate to address for fiscal year 1990 only the concerns raised in the *Portland Audubon Society v. Lujan* case." H.R. Conf. Rep. No 264, 101st Cong., 1st Sess. 89, (reproduced at Appendix F to Respondents' Brief in Opposition To Petition For Certiorari, at 120a–121a. Plainly, Congress was attempting to dictate an outcome in these specific cases for fiscal year 1990.

C. Petitioners' "Deeming" Argument Is Simply A Recast of Their "Amendment" Argument, And Should Be Rejected On the Same Ground As Their Amendment Argument

Petitioners' final argument with respect to the interpretation of § 318(b)(6)(A) is that it "provides, at most, a legal characterization, operating as a deeming provision or legislative presumption." Petitioners' brief at 17. This, however, is simply another way of stating Petitioners' argument that Congress "amended" the legislation at issue in the listed cases, as opposed to issuing a "rule of decision" for those cases. Since Congress expressly did *not* intend to amend existing legislation, petitioners' "deeming" argument should

be rejected on the same grounds as its "amendment" argument.[9]

Petitioners admit that, for § 318(b)(6)(A) to operate as a "deeming provision or legislative presumption," Congress must have intended to "prescrib[e] governing substantive legal standards — a legislative function...." *Id.* at 17-18. Yet that is precisely what the authors of § 318(b)(6)(A) assured the other members of Congress they were *not* doing. The prescription of "governing legal standards" for the laws "at issue" in the instant cases necessarily would amend the "governing legal standards" *already* present in those laws. Petitioners' "deeming" argument ignores Congress' specific statement that it did *not* intend to amend any existing laws, and the argument is without merit.

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9 Petitioners argue that under the court of appeals' decision in this case, either Congress is constitutionally barred from deeming that certain action complied with existing laws, or it may not mention specific cases when doing so. Petitioners' brief at 27. Petitioners argue that the first result would unreasonably restrict Congressional power, and the second is based upon an artificial distinction. *Id.* But it is not at all artificial to say that when Congress identifies specific pending litigation in "deeming" that certain conduct satisfies existing laws, it is impermissibly interfering in that litigation. If no litigation was pending, it would be difficult to argue that Congress was interfering in pending litigation. When litigation *is* pending, however, and Congress specifically identifies it in a statute, Congressional intent to intervene in that litigation is much more easily discernible.

II. CONGRESS MAY NOT CONSTITUTIONALLY DICTATE OUTCOMES IN PENDING CASES

This Court has long recognized that Article III, § 1, of the United States Constitution, together with the doctrine of separation of powers, prevents Congress from "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it." *United States v. Klein,* 80 U.S. (13 Wall.) 128, 146 (1872).[10] "Article III, § 1, 'was designed as a protection for the parties from the risk of legislative or executive pressure on judicial decision.' " *Commodity Futures Trading Comm'n. v. Schor,* 478 U.S. 833, 848 (1985) (citing Currie, *Bankruptcy Judges and the Independent Judiciary,* 16 Creighton L. Rev. 441, 460, note 108 [1983]).

A statute violates the Constitution's separation of powers if "it prescribe[s] a rule of decision in a case pending before the courts, and [does] so in a manner that require[s] the courts to decide [the case] in the Government's favor." *United States v. Sioux Nation of Indians,* 448 U.S. 371, 404 (1980). As the Court explained in *Vermont v. New York,* 417 U.S. 270, 277 (1974): "Article III speaks of the 'judicial power' of this Court, which embraces application of principles of law or equity to facts, distilled by hearings or by stipulations." This function of applying the law to the facts of particular cases lies at the core of the judicial power assigned to the federal judiciary by the Constitution, and it

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10 Article III of the Constitution provides that the judicial power shall be vested in the Supreme Court and such inferior courts as Congress may from time to time ordain and establish. U.S. Const. Art. III, § 1. The judicial power extends to all cases and controversies, in law and equity, arising under the Constitution, the laws of the United States, and treaties made under their authority. U.S. Const. Art. III, § 2.

is this power that Congress has invaded by directing a particular rule of decision in these cases.[11]

A. When Congress Attempts to Decide Pending Cases, No Further Constitutional Analysis is Required

Some intrusions into Article III powers are so fundamental that no extended analysis is required to detect a violation. That is the case where, as here, Congress directly intervenes in pending litigation in order to decide the pending controversy. In this respect these cases are directly analogous to *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1872). The facts surrounding the *Klein* decision illustrate how Congressional intrusion into judicial decisionmaking in pending cases can violate Article III.

Immediately prior to its decision in Klein, the Court had determined, in *United States v. Padelford,* 76 U.S. (9 Wall.) 531, 542 (1870) that receipt of a Presidential pardon for

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11 The legislative history of § 318 makes clear the judicial nature of the power exercised by Congress. The Conference Report accompanying Public Law No. 101-121 admits that Congress stepped into these cases:

> *because* [plaintiffs'] challenger raise serious concerns about the adequacy of planned actions of the agencies with regard to managing habitat for the northern spotted owl and minimizing fragmentation of old growth stands. The managers are extremely concerned that the agencies did not pursue avenues to resolve the conflicts or more adequately addressed the issues raised in these legal challenges, thereby requiring the inclusion of this section.

H.R. Conf. Rep. No. 101-264, 101st Cong., 1st Sess., at 87 (1989) (emphasis added). In other words, Congress made a preliminary determination that the federal petitioners were violating the law in these cases, but prescribed a remedy for those violations — a congressionally directed temporary disposition of these laws — that allowed petitioners to continue violating the unchanged underlying law.

participating in the rebellion during the Civil War constituted conclusive proof of loyalty to the United States. Following the *Padelford* decision, Congress adopted a law stating that receipt of a Presidential pardon could *not* be used as proof of loyalty, and that acceptance of a pardon would be conclusive proof of *disloyalty*. Act of July 12, 1870, ch. 251, 16 Stat. 235.

The court of claims, prior to the *Padelford* decision, had awarded the administrator of Klein's estate the proceeds from a sale of Klein's property seized after the war. Klein had aided the rebellion but subsequently obtained a pardon. After Congress adopted the Act of July 12, 1870, making receipt of a pardon proof of disloyalty, the United States appealled the court of claims' award to this Court, arguing that the 1870 Act now compelled a different conclusion than the Court had reached in *Padelford*. The Court found that the Act of July 12, 1870, violated the Constitution's separation of powers because it denied the courts jurisdiction in then-pending cases based "solely on the application of a rule of decision...prescribed by Congress." 80 U.S. (13 Wall.) at 146.

The intervention by Congress into the Article III powers of the Court in this case is even more direct and intrusive than in *Klein*. In *Klein* the Court had to infer Congressional intent to decide pending cases from the fact that the law in question was adopted shortly after the *Padelford* decision and appeared to be directed at that decision. Here, no such inference is necessary. Congress has identified not only the

"rule of decision," but also *the very cases in which it is to be applied.*[12]

Congress' direct use of Article III powers is obvious and immediate in these cases, and intrudes directly into pending litigation. This distinguishes these cases from other, more recent, Article III challenges that the Court has considered. In *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833 (1986) for example, Congress empowered the Commodity Futures Trading Commission to undertake quasi-judicial determinations while implementing a broad regulatory scheme adopted by Congress. The question in *Schor* was whether Congress had assigned Article III powers to a non-Article III administrative agency. The Court's Article III analysis was directed to Congress' power to create non-article III forums which performed Article III-type functions. *See also Thomas v. Union Carbide Agricultural Products,* 473 U.S. 568 (1985) (Congress may create system for voluntary arbitration of claims for compensation arising from follow-on use of trade secret

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12 Petitioners attempt to distinguish *Klein* by arguing that *Klein* "involved an attempt to manipulate the subject matter jurisdiction of the courts in order to reach an unconstitutional result," whereas in this case "Section 318(b)(6)(A) precludes judicial review of the (b)(3) and (b)(5) guidelines, but Section 318 permits judicial review of other statutory and constitutional claims, including compliance with Section 318 itself." Petitioners' brief at 43 (emphasis added). This is not accurate. While § 318(b)(6)(A) does allow judicial review of claims under statutes other than those under consideration in the listed cases, as well as review of other claims under these same statutes, § 318(b)(6)(A) "manipulates the subject matter jurisdiction of the courts" by directing that compliance with subsections (b)(3) and (b)(5) is "adequate consideration for the purpose of meeting the statutory requirements *that are the basis for [these] consolidated cases captioned....*" As petitioners successfully argued in the district courts below, this language effectively precluded the courts in the two cases specifically identified in § 318(b)(6)(A) itself from applying the law *in those cases* to the facts *in those cases* in any manner other than that dictated by Congress. Of course, as the district courts failed to acknowledge, such an outcome violates the separation of powers.

information in the registration of pesticides); *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (Congress may not vest Article III powers in non-Article III bankruptcy judges).

The analysis used in these cases is not necessary when determining whether Congress itself may decide a pending case.[13] The Court should, therefore, as it did in *Klein*, simply identify the Article III intrusion in the instant cases for what it is. The extended analysis of *Schor*, which has traditionally been applied only to Congressional allocation of adjudicative powers to the Executive, is simply inapplicable. Even under the *Schor* analysis, however, § 318(b)(6)(A) violates the separation of powers.

B. Section 318(b)(6)(A) Violates the Constitution's Separation of Powers Under More Contemporary Jurisprudence

Although Klein applies directly and should govern the outcome in these cases, the Court has not expressly limited its Schor analysis to cases involving Congressional creation of non-Article III forums that exercise quasi-adjudicative powers. Accordingly, this section of the brief addresses § 318(b)(6)(A) in the context of the *Schor* analysis. That

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13 If Congress, for example, were to disagree with a decision of the Commodity Futures Trading Commission on a counterclaim presented by a broker, Congress could not legislatively reverse the decision of the Commission without running afoul of Article III. The Commission may properly exercise adjudicative power in part *because* that exercise is reviewable by an Article III court. Absent specific statutory authorization, however, legislation reversing a Commission decision would not be reviewable by an Article III court, and would therefore arrogate entirely to Congress an adjudicative power assigned by the Constitution to the judiciary.

analysis leads in any event to the same conclusion as *Klein*, and usefully illustrates the Article III problems arising from Congressional intrusion into pending cases. In *Schor* the Court framed the inquiry in cases involving Article III challenges to powers granted to the Executive branch as follows:

> [I]n reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary (citation omitted). Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

478 U.S. at 851. *See also Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568, 583 (1985). Applying the *Schor* factors to § 318 reveals the extent to which § 318(b)(6)(A) intrudes on the Article III powers of the courts. The *Schor* factors also reveal the absence of any compelling reason for such an intrusion.

1. Section 318 erodes the essential attributes of judicial power

Nothing is more an "essential attribute of the judicial power" than deciding how the existing statutes at issue in these consolidated cases apply to the facts of the cases.[14] *See Schor, supra,* 478 U.S. at 851. *See also Klein, supra,* 80 U.S. (13 Wall.) at 146; *Pope v. United States,* 323 U.S. 1, 11, 12 (1944) (even in cases where Congress has consented to judgment, judicial function is preserved so long as an Article III court applies law to facts in order to reach that judgment). Congress simply may not take away from Article III courts the core judicial function of applying the law to the facts in the context of a particular dispute. Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 84-86 (1982).

Although not briefed by petitioners, the fact that § 318(b)(6)(A) is arguably a public law may be relevant in applying the *Schor* analysis.[15] The plurality opinion in *Northern Pipeline* suggested that Congress might have greater leeway to delegate Article III-type powers to a non-Article III forum when "public rights" are involved. *See Northern Pipeline, supra,* 458 U.S. at 71. As the Court subsequently noted in *Thomas, supra,* 473 U.S. at 585-589, however, "[t]he theory that the public rights/private rights

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14 As the Court noted in *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 71 (1982), Congress may exercise Article III powers only if there is an "exceptional grant of power" flowing from an independent source in the federal constitution. The petitioners do not suggest that any independent source of power in the Constitution would authorize the exercise of Article III powers in this case.

15 The petitioners do argue that § 318(b)(6)(A) represents an exercise by Congress of its powers under the Property Clause, and the Congress' powers are at their zenith when exercised pursuant to such a specific Constitutional authorization. *See* Petitioners' brief at 18, 39. The fact that petitioners have identified a possible Constitutional source for Congress' power, however, does not further the analysis of whether that power was exercised in a constitutionally infirm manner.

dichotomy...provides a bright line test for determining the rights of Article III did not command a majority of the Court in *Northern Pipeline*....In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on judicial powers is reduced."[16]

Where, as here, the Executive branch *itself* is the "regulated" entity (as opposed to being the entity accused of improperly exercising Article III powers), and the question is whether the Executive branch has complied with existing laws, the question cannot "be conclusively determined by the Executive and Legislative Branches." While administrative agencies may generally exercise quasi-judicial powers in appropriately prescribed circumstances without violating Article III, such determinations do not threaten the power of Article III courts in part because Article III courts may ultimately review the administrative decision. *See Northern Pipeline, supra,* 458 U.S. at 78-79 ("this Court has sustained the use of adjunct factfinders...so long as those adjuncts were subject to sufficient control by an Article III district court.") *See also United States v. Raddatz,* 447 U.S. 667, 681-683 (1980) (upholding the Federal Magistrates Act against an Article III challenge in part because magistrate decisions were subject to review by Article III judges); *Thomas, supra,* 473 U.S. at 592 ("FIFRA limits but does not preclude review of [voluntary] arbitration proceeding[s] by an Article III court."); *Atlas Co. v. Occupational Safety & Health Review Comm'n.,* 430 U.S. 442, 455 (1977)(Congress

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16 To qualify as involving a "public right," the dispute "must at a minimum arise 'between the government and others.'" *Northern Pipeline, supra,* 458 U.S. at 69 (citing *Ex Parte Bakelite Corp.* 279 (U.S. 438, at 451 [1929]). The Court provided examples of what might constitute "public rights," citing *Crowell v. Benson,* 285 U.S. 22, 51 (1932).

could assign adjudication of "public rights" to administrative agency because judicial review by Article III courts was available).

Under § 318(b)(6)(A), there is no opportunity of an Article III court to review the Congressional determination that the Executive branch has complied with existing laws. Rather, Congress itself performed the function of applying existing laws to facts at issue in these cases, and directed the Article III courts to implement its decision. Rather than insuring independent review by an Article III court, Congress divested Article III courts of this "essential attribute[] of the judicial power." *Northern Pipeline, supra,* 458 U.S. at 87.[17] The fact that it applied public laws in doing so does not alter the nature or unconstitutional effect of the intrusion.

2. The right to hold the government accountable to the rule of law is of primary importance

The "origin and importance of the right[s] to be adjudicated" in these cases also suggest that Congress acted improperly by stepping in and deciding the cases. *Schor, supra,* 478 U.S. at 851. The "rights to be adjudicated" are established in environmental legislation imposing nondiscretionary obligations on federal agencies. *See, e.g.,* 42 U.S.C. § 4332 (NEPA) ("all agencies of the Federal Government

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17 In *Northern Pipeline,* the Court's conclusion that Congress had placed the "essential attributes of the judicial power" in the hands of non-Article III bankruptcy judges was based in part upon the fact that the power of Article III judges to review the decisions of bankruptcy judges was limited to review for "clear error." Bankruptcy judge orders also could become final judgments, even in the absence of an appeal to an Article III judge. *Northern Pipeline,* 478 U.S. at 85-86. In these cases the Article III intrusion is even more clear, since there is *no* opportunity for Article III review of Congress' determination that the petitioner's conduct satisfies the underlying laws.

shall (prepare EIS's on) major Federal actions significantly affecting the quality of the human environment") (emphasis added); 16 U.S.C. § 1604(e), (f) ("required assurances" and "required provisions" for plans governing the national forests).

Since petitioners are themselves the regulated entities under these laws, the Executive branch cannot be expected to perform the law *enforcement* role it typically fulfills when regulating the private sector.[18] The Congressional intrusion into the Article III powers of the courts, therefore, leaves compliance with these laws to the unfettered discretion of the very agencies that are *subject to* the laws, and who have been accused of violating the laws in pending cases.[19] The only "review" is that of Congress, which has absorbed the adjudicative role of the courts. Such a result threatens the rule of law and the Constitution's carefully crafted separation of powers.

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18 *See* Memorandum of John R. Bolton, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs, to Representative John D. Dingell, Chairman, Subcommittee on Oversights and Investigations (1985) (concluding that the separation of powers doctrine prevents courts from adjudicating inter-agency disputes when both agencies belong to the Executive branch, because two agencies in a single branch of government cannot create a constitutional "case of controversy." (cited in M. Axline, *Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases*, 12 Harv. Envt'l. L. Rev. 1, 11, note 33 (1988).

19 It is no answer to claim that judicial review is still available for agency compliance with §§ (b)(3) and (b)(5). Those subsections do not alter the preexisting and independent commands of NEPA, NFMA, FLPMA, OCLA, and MBTA.

3. The concerns that drove Congress to assume Article III powers are marginal

The "concerns that drove Congress to depart from the requirement of Article III" when it adopted § 318 are hardly compelling; those concerns were that the courts had enjoined the federal defendants from violating the law. Excusing federal agency violations of law, without altering the law itself, is not a "compelling reason" for Congress to invade the judicial province.[20] In *Schor,* this Court found "readily understandable" Congress's concern with "creating an inexpensive and expeditious alternative forum through which customers could enforce the provisions of the CEA [Commodities Exchange Act] against professional brokers." 478 U.S. at 855. And in *Thomas v. Union Carbide Agricultural Products,* 473 U.S. 568, 590 (1985) the Court found that Congress's grant of adjudicatory power to a non-Article III arbitration process was justified by Congress's concern with "spreading the costs of generating adequate information regarding the safety, health, and environmental impact of a potentially dangerous product."

In this case, an alternative that would have met Congress's concerns without intruding into pending litigation was available to Congress — simply modifying the underlying legislation. Instead, Congress chose this unconstitutional route.[21] To make matters worse, Congress

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20 It is no answer to say that Congress was also concerned with the *effects* on timber supplies of judicial rulings that the Petitioners were violating the law; there is no question that Congress had the power to alter the laws (rather than directing the courts to reach a different result under existing laws) if it wished to alleviate the effects of enforcing those laws.

21 As we discussed below, the fact that Congress could have achieved the same ends through means that did not violate the Constitution does not, as petitioners argue, permit the Court to ignore the unconstitutional means actually chosen by Congress.

adopted the offending provision *not* through the regular legislative process, where it would have been considered by committees with authority over the agencies' conduct and substantive legislation, but rather through the appropriations process, where it received virtually no serious consideration by Congress as a whole.

The Supreme Court has made clear that, although substantive legislation may be adopted through the appropriations process, that is a disfavored method of law-making. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978). That is because "[t]he rules of both Houses 'prohibit legislation' from being added to an appropriation bill." *Andrus v. Sierra Club*, 442 U.S. 347, 359-60 (1979) (citing Fisher, *Budgets Concepts and Terminology: The Appropriations Phase*, in 1 *Studies in Taxation, Public Finance and Related Subjects - A Compendium*, 437 (Fund for Public Policy Research 1977); Standing Rules of the U.S. Senate, Rule 16(4); Rules of the House of Representatives, 96th Cong., 1st Sess., Rule XXI(2) (1979); 7 C. Cannon, *Precedents of the House of Representatives*, §§ 1172 *et seq.* [1936]). This distinction "is maintained to assure that program and financial matters are considered independently of one another. This division of labor is intended to enable the Appropriations Committees to concentrate on financial issues and to prevent them from trespassing on substantive legislation." 442 U.S. at 361 (citing *House Budget Committee, Congressional Control of Expenditures*, 19 [Comm. Print 1977]).

4. This Case involves a threat to the independence of the courts, rather than a denial of access to an individual claiming invasion of an independent Constitutional right

The Petitioners argue that independent provisions in the Constitution, such as the Due Process Clause and the Takings Clause, restrict Congress' ability to change the law and affect pending cases, and that "[t]he role of Article III is not as a back-up for those specific provisions, addressing the same subject a second time if no violation of the directly pertinent provision has been found." Petitioners' brief at 35. Petitioners also argue that "deeming" provisions may only be challenged on constitutional grounds when they implicate a "liberty or property interest protectable under the Due Process Clause which would limit Congress' use of a conclusive presumption in defining compliance with such enactments." Petitioners' brief at 38. Petitioners cite no authority for such a narrow reading of Article III, and indeed there is none.[22]

This Court has recognized both structural and individual dimensions to Article III's scope. *See Schor, supra,* 478 U.S. at 831. An act of Congress can certainly pose a structural threat without invading a constitutionally protected individual interest. In fact, that was precisely what occurred in *Klein, supra.* No individual constitutional rights were

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22 Petitioners' argument is contradicted by Petitioners' own admission that "Article III nevertheless has an important role to play in determining Congress's ability to affect pending litigation. Article III, by vesting the 'judicial power' in the judiciary (Art. III, §§ 1, 2), protects against invasion of the adjudicative function." Petitioners' brief at 36. Article III's protection of the independence of the judiciary is simply not dependent upon the existence of other constitutional provisions.

implicated in *Klein*.[23] Rather, the Court was concerned with the structural threat to the Constitution's separation of powers when Congress "deemed" that a certain fact (obtaining a pardon) would have congressionally determined consequences (proof of disloyalty) in a pending case without changing the law that otherwise governed the legal issues of loyalty and disloyalty. A structural threat to Article III and the separation of powers *arises* from a "deeming" provision when such a provision is expressly directed at deciding pending litigation.

The nature of the concern in *Klein*, as in the instant cases, *was not* that an individual was improperly denied access to an Article III court, but rather that Congress has upset the balance of powers established by the Constitution. Article III of the Constitution placed judicial power in the hands of an independent judiciary because "[a] Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 217-18 (1980). In § 318(b)(6)(A), Congress has attempted to control the core judicial power of Article III courts in two pending cases. That violates the Constitution's separation of powers.

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23 The Court in *Klein* also concluded as an alternative holding, that the challenged Congressional action violated the separation of powers by intruding on the Executive's pardon powers. That conclusion, however, was distinct from, and *not* a predicate to, its holding with respect to the invasion of Article III powers.

CONCLUSION

The court of appeal's opinion that § 318(b)(6)(A) violates the Constitution's separation of powers is correct and should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

JONATHAN GLOGAU
Assistant Attorney General
Counsel of Record

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-4830

COUNSEL FOR AMICI CURIAE

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, *ET AL.*,

Petitioners,

v.

SEATTLE AUDUBON SOCIETY, *ET AL.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION AND BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF AFFIRMANCE

Patti A. Goldman
(Counsel of Record)
Alan B. Morrison
David C. Vladeck

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amicus* Public Citizen

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MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE A BRIEF IN SUPPORT OF AFFIRMANCE AS *AMICUS CURIAE*

Public Citizen is a non-profit organization that works to ensure government accountability. One means that Public Citizen has used to further this objective is advocating the position that the three branches of the federal government must abide by the constitutional doctrine of separation of powers. Of particular relevance to this case, Public Citizen attorneys have argued that Congress may not avoid political accountability by resorting to expedient shortcuts that evade the strictures of the doctrine of separation of powers. *See Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Metropolitan Washington Airports Authority v. Citizens for*

the Abatement of Aircraft Noise, 111 S. Ct. 2298 (1991).

The issue in this case is whether Congress exceeded its role by mandating a particular result in a pending case. Public Citizen believes that Congress's action usurped the role of the Judicial Branch. However, Public Citizen reaches this result by an analysis that produces a broader set of prohibitions than the court of appeals opinion or the positions of any of the parties on what Congress can do to achieve a particular outcome in a pending case. Thus, while the court of appeals drew the line between permissible legislative repeals or amendments on the one hand, and impermissible directions to courts commanding a particular result on the other, Public Citizen takes the position that the more appropriate dividing line is between laws of general applicability and case-specific ones.

Under this approach, Congress cannot constitutionally compel a particular outcome in a pending case, without adopting a rule of general applicability, regardless of whether it does so by explicitly directing the court to reach a particular result, or by couching that direction as a temporary exemption of the challenged actions from the unchanged requirements of the laws that form the basis of the challenge, or by eliminating the courts' jurisdiction to hear the case. Because the Constitution prohibits Congress from directing a court to reach a particular result in a pending case, Congress must not be permitted to accomplish the same result by using alternative language that makes no substantive change in the underlying legal standards.

Because Public Citizen is presenting a broader analysis than is being presented by the parties or the other *amici*, it respectfully asks the Court to grant it leave to file the accompanying brief as *amicus curiae* in support of affirmance of the judgment below.[1]

---

[1] Respondents Association of O & C Counties and Benton County have not consented to this motion; respondents Seattle Audubon Society *et al*. have consented, and the other respondents and petitioners have not yet indicated whether they consent.

Respectfully submitted,

Patti A. Goldman
(Counsel of Record)
Alan B. Morrison
David C. Vladeck

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Attorneys for Public Citizen

OCTOBER 1991

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BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF AFFIRMANCE

INTRODUCTION AND SUMMARY OF ARGUMENT[1]

In three recent cases, this Court has admonished that Congress may not avoid political accountability by resorting to expedient shortcuts that evade the strictures of the doctrine of separation of powers. *See Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Metropolitan Washington Airports Authority v. Citizens for*

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[1] The interest of *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

the Abatement of Aircraft Noise, 111 S. Ct. 2298 (1991). This case involves another such device by which Congress has attempted to dictate the result that a court must reach in a pending case, without changing the underlying legal standards. There is general agreement between the parties that the Constitution prohibits Congress from prescribing a rule of decision for a particular case. The issue addressed in this brief is whether Congress can evade this prohibition by resorting to clever legislative drafting.

While Public Citizen agrees with the result reached below, it embraces a broader rationale for finding that Congress exceeded its constitutional role. The court of appeals drew the line between permissible legislative repeals or amendments on the one hand, and impermissible directions to courts to reach a particular result in a pending case, on the other. However, under this dichotomy, Congress could repeal a portion or particular application of a statute, even if it were done only to the extent, and for the time, necessary to alter a particular judicial ruling in a pending case. Such a case-specific repeal presents all of the dangers of an explicit legislative direction of the same outcome.

Public Citizen urges the Court to draw a more appropriate dividing line between laws of general applicability and those that are case-specific only. Under that approach, Congress may compel an outcome in a case by changing generally applicable legal standards, but not simply for this case and the particular circumstances underlying it. Thus, Congress could not constitutionally compel a particular outcome in a pending case without adopting a rule of general applicability, regardless of whether it did so by explicitly directing the court to reach that result, or by couching that direction in an exemption of the challenged actions from the unchanged requirements of the laws that form the basis of the challenge, or by eliminating the courts' jurisdiction to hear the case. All of these legislative devices have the same impermissible purpose and effect: they place Congress in the position of dictating the outcome of a pending case without making any principled, substantive change in the underlying legal requirements. Because, as all of the parties agree, the Constitution prohibits Congress from directing a court to reach a particular result in a pending case, Congress must not be permitted to

accomplish the same result by using alternative language that makes no substantive change in the underlying legal requirements.

BACKGROUND

It is common practice for unsuccessful litigants to seek redress in Congress. In response to such constituent demands, Members of Congress frequently try to change the result of judicial decisions.

Under normal congressional procedures, the congressional committees with jurisdiction over the matter will review the decision, hold hearings, and develop legislation that alters the substantive standards of the underlying law to correct what Congress perceives to be flaws in the system. Future cases will be governed by the new legal standards, quite possibly with a different outcome than the case that spurred the change in the law.

Sometimes, however, Members of Congress seek to short-circuit committee review and the development of general changes in the underlying legal obligations. Instead, they devise a quick-fix solution, frequently in the form of an appropriations rider, that dictates a different result in a pending case without making any general changes in the underlying laws. Other Members of Congress tend to defer to the sponsors of case-specific riders. This tendency is especially pronounced where the rider is primarily of local concern, given the tradition of pork barrel politics and deference to local delegations on what are perceived to be local matters. As a result, these quick-fix measures evade any thorough analysis and avoid the political consequences of amending the underlying legal standards outright.

In the environmental law context, these case-specific riders have taken various forms. Some have directed that the challenged agency action go forward without any further action under the statute on which the action was challenged and found deficient. *See* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 203, 87 Stat. 576, 584-85 (1973); Supplemental Appropriations Act for Fiscal Year 1985, Pub. L. No. 99-88, 99 Stat. 293, 340

(1985). Others have directed a particular agency action to go forward, "notwithstanding" the statutory requirements that a court had found were violated by the action, or "notwithstanding" an injunction issued by a court. Energy & Water Development Appropriation Act of 1980, Pub. L. No. 96-69, 93 Stat. 437, 449-50 (1979); Continuing Appropriations Act for Fiscal Year 1987, Pub. L. No. 99-591, § 114, 100 Stat. 3341-349 (1986); Supplemental Appropriations Act for Fiscal Year 1985, Pub. L. No. 99-88, 99 Stat. 293, 340 (1985).

Some of the more explicit riders have directed the courts to find particular facts or to deem the agency's action to meet the requirements of the law. For example, one rider directed that a draft environmental impact statement would be treated as a final one, notwithstanding the requirements of the law or court injunctions then in effect. Department of the Interior & Related Agencies Appropriations Act of 1989, Pub. L. No. 100-446, § 321, 102 Stat. 1774, 1827 (1988). Another rider provided that the requirements of certain laws "shall be deemed to be satisfied" by whatever unspecified actions had been taken by the agency with respect to the underlying matter. Arizona-Idaho Conservation Act of 1988, Pub. L. No. 100-696, §§ 602, 607, 102 Stat. 4571, 4597-99 (1988). Most such riders also provide that the previously challenged action no longer may be subject to judicial review. *See* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 203, 87 Stat. 576, 584-85 (1973); Supplemental Appropriations Act for Fiscal Year 1985, Pub. L. No. 99-88, 99 Stat. 293, 340 (1985).

Congress followed this course of action with respect to the disputes underlying these cases. Although not at issue in this case, an earlier appropriations rider had responded to a lawsuit challenging petitioner Bureau of Land Management's ("BLM's") failure to prepare a supplemental environmental impact statement incorporating new information on the status of the spotted owl. That rider stated:

> Nothing shall limit judicial review of particular activities on these lands: *Provided, however*, That there shall be no challenges to any existing plan on the sole basis

> that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further*, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, § 314, 101 Stat. 1329-254 (1987).[2]

This rider derailed only one of many challenges to the BLM's timber sales program in public lands in Oregon that contain spotted owls. *See Portland Audubon Society v. Lujan*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1470 (1990); *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied sub nom. Northwest Forest Resource Council v. Portland Audubon Society*, 109 S. Ct. 3229 (1989). Subsequently, several environmental organizations filed a lawsuit challenging petitioner Forest Service's violation of numerous environmental laws in its timber sales program in public lands in the State of Washington on which spotted owls depend for their survival. *Seattle Audubon Society v. Robertson*, C89-160WD (W.D. Wash.). After the district court enjoined timber sales in certain public lands in Washington, *id.* (order, Mar. 1989), the timber industry protested vigorously to the public and to their Senators and Representatives. In response, Senators from Washington and Oregon introduced an appropriations rider to remove the injunctions in the two cases. The Senate amendment would have required timber sales to go forward in spotted owl habitat "notwithstanding any provision of law that is a basis for any stay, restraining order or injunction issued in" the two cases identified by caption and docket number. 135 Cong. Rec. S8776 (July 26, 1989). It also would have barred the courts from issuing any restraining order or injunction, or

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[2] This rider was reenacted without change in subsequent years. Department of the Interior & Related Agencies Appropriations Act for Fiscal Year 1989, Pub. L. No. 100-446, § 314, 102 Stat. 1774, 1825-26 (1988); Department of the Interior & Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 312, 103 Stat. 701, 743 (1989).

voiding any sale, in fiscal year 1990 with respect to such timber sales. *Id.*[3]

In the House of Representatives, there was strong opposition to insulating the agencies from the requirements of the underlying environmental laws and from judicial remedies. *See* Representatives' Letter of Sept. 11, 1989, reprinted as App. B to Respondents' Brief. As a result, the conferees substituted a straightforward direction to the courts that management of the public lands "according to" portions of the rider "is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases," which the rider then cites by caption and docket number. Section 318(b)(6)(A), Department of the Interior & Related Agencies Appropriation Act for Fiscal Year 1990, Pub. L. No. 101-121, tit. III, 103 Stat. 701, 747 (1989). Congress made this direction without exempting the agencies, the lands, or the spotted owl from the underlying environmental laws, and without otherwise modifying the requirements of such laws. To the contrary, the conference report explicitly states: "This section in no way alters application of the Endangered Species Act or other environmental laws to Forest Service or BLM management activities." Opp. Cert. App. 122a. The rider also did not remove judicial remedies generally, except for its bar on temporary relief, whose effect is tempered by the rider's direction to the courts to expedite such cases. Section 318(g). It appears that the conferees left the agencies subject to the requirements of the underlying environmental laws, but ensured that there would be no way for the public or the courts to enforce the most pertinent of those legal obligations -- those that had formed the basis of the previous challenges and that the courts previously had indicated had likely been violated.

The rider at issue in this case combines some of the worst features of case-specific lawmaking. There were no hearings, there was little debate, and the issues were resolved not by the

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[3] A floor amendment narrowed this remedies limitation to temporary relief, thereby permitting a court to void a sale after a trial on the merits. 135 Cong. Rec. S8791 (July 26, 1989).

committees with substantive jurisdiction, but by the appropriations committees, even though the rider had no significant fiscal consequences. Not only did Congress refuse to adopt any rules of general applicability, but it simply directed that whatever the agencies chose to do under the rider would be adequate during Fiscal Year 1990 for meeting the requirements of the laws that formed the basis of the existing court challenges. After that fiscal year, a court could again determine that the very same actions taken before, after, and possibly even during that year violated the same governing legal requirements. In other words, Congress passed a law applicable only to those activities of these two agencies that had been challenged in two specific cases, and then only for one fiscal year. In purpose and effect, this rider had no consequences other than to dictate the result for the pending lawsuits.

ARGUMENT

The Constitution divided "the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983). It is "a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power." *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 201-02 (1928). Under this doctrine of separation of powers, "it is a breach of the National fundamental law . . . if by law [Congress] attempts to invest itself or its members with either executive power or judicial power." *Buckley v. Valeo*, 424 U.S. 1, 121-22 (1976) (per curiam). As this Court has repeatedly recognized, this doctrine serves "as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 122; *see The Federalist* No. 48, at 308 (E. Earle ed. 1937) (J. Madison) ("none of [the branches] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective

powers").

The Framers were particularly concerned that the Legislative Branch had the potential power to encroach on the Executive and Judicial Branches:

> Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments.

The Federalist No. 48, at 323 (E. Earle ed. 1937) (J. Madison). As this Court reaffirmed last Term:

> To forestall the danger of encroachment "beyond the legislative sphere," the Constitution imposes two basic and related constraints on Congress. It may not "invest itself or its Members with either executive power or judicial power." *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394 (1928). And, when it exercises its legislative power, it must follow the "single, finely wrought and exhaustively considered, procedures" specified in Article I. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 111 S. Ct. 2298, 2311 (1991) (footnote omitted). Both the separation of powers principle and the lawmaking requirements of the Bicameralism and Presentment Clauses serve as affirmative limitations on Congress's powers, the former by limiting Congress to lawmaking and related activities, and the latter by requiring Congress to act in a politically accountable manner through the constitutionally prescribed lawmaking process.

In Article III, the Constitution not only assigns the power to decide cases and controversies to the Judicial Branch, it also protects the independence of the Judicial Branch to ensure that such cases and controversies are resolved without interference

from the political branches. Thus, Article III provides that federal judges will have life tenure and that their salaries may not be diminished. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court emphasized that the independence of the judiciary must be jealously guarded from outside interference and held that judges without both life tenure and protection against salary diminution could not exercise Article III judicial power. Similarly, the Court underscored the importance of these features of judicial independence in *United States v. Will*, 449 U.S. 200, 217-18 (1980), stating that "[a] Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government."

The division of responsibility between the Legislative and Judicial Branches ensures that the political lawmaking branch (in concert with the President) enacts the laws, but that the nonpolitical, independent Judicial Branch interprets and applies those laws to the cases and controversies brought by parties to the courts. Other parts of the Constitution reinforce this balance between the Legislative and Judicial Branches. Thus, under the Ex Post Facto Clause, Art. I, § 10, cl. 1, Congress may not enact a law that retroactively imposes punishment, *i.e.*, that changes the criminal legal consequences of completed acts. The purpose of this prohibition is to prevent Congress from enacting arbitrary or vindictive legislation. *Miller v. Florida*, 482 U.S. 423, 429-30 (1987); *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Similarly, under the Due Process Clause, Congress may not arbitrarily or irrationally make laws retroactively applicable. *United States v. Sperry Corp.*, 110 S. Ct. 387, 396 (1989); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728-31 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-17 (1976). Likewise, the Bill of Attainder Clause, Art. I, § 10, cl. 1, prohibits Congress from legislatively determining guilt and inflicting punishment on an identifiable individual or group of individuals without the protections of a judicial trial and the political independence of the judiciary. *Nixon v. Administrator of General Services*, 433 U.S. 425, 468-69 (1977); *United States v. Lovett*, 328 U.S. 303, 315 (1946).

This case concerns another such limitation on Congress's power to exercise powers more properly assigned to the judiciary: Congress cannot prescribe the rule of decision for a pending case. This proscription recognizes that it is the province of the courts to interpret and apply the law to cases before them. It ensures that such determinations are not made by politicians, but rather by independent, impartial judges, and that they are made based on the evidence before the court, with all of the protections of the judicial process.

Several cases of this Court illustrate the limits of Congress's power to dictate the result in a case. In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852), the Court held that a proposed bridge over the Ohio River was a common law nuisance because it would have interfered with Congress's regulation of commerce on the river. Congress then passed a statute designating the roads leading to the proposed bridge to be postal roads that could not be obstructed. This designation of the bridge as a postal road, an act traditionally undertaken by Congress, permanently changed the operative legal framework for the Court's analysis. Accordingly, in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), which was not cited by the government here, the Court held that, under the new law regulating interstate commerce, the bridge would no longer be an impermissible obstruction.

In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), the Court revisited this issue. An individual sued in the Court of Claims under an 1863 statute that allowed recovery of property captured during the Civil War, if the claimant could prove that he or she had not aided the rebellion. The claimant won the case in the Court of Claims based on an earlier Supreme Court decision that a presidential pardon proved conclusively that the pardoned individual had not assisted the rebellion and was entitled to the property. *See United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870). However, while the case was pending in the Supreme Court, Congress passed a statute providing that: (1) a pardon could not used as evidence of the claimant's loyalty in support of a claim to captured property; (2) a pardon would be conclusive evidence of any acts of disloyalty recited in it, thereby precluding

recovery; and (3) upon proof of a pardon indicating disloyalty, the jurisdiction of the Court of Claims (and the Supreme Court with respect to appeals) would cease, and the case would be dismissed.

This Court held that the statute intruded into the judicial function because "the court is forbidden to give the effect to the evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary." 80 U.S. at 147. The Court distinguished *Wheeling Bridge* because "[n]o arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act." *Id.* 146-47.

The Court also held the jurisdictional bar unconstitutional because it was "founded solely on the application of a rule of decision, in causes pending prescribed by Congress." *Id.* at 146. Elaborating on the provision withholding appellate jurisdiction, the Court noted that it was no more than "a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this Court had adjudged them to have." *Id.* at 145, 146. Because Congress had prescribed a rule of decision in a case, even though it did so in the guise of its admitted authority to establish exceptions and regulations to the Supreme Court's appellate jurisdiction, the Court held the statute unconstitutional.[4]

The jurisdictional aspect of the holding in *Klein* indicates that this Court has refused to elevate form over substance in determining whether Congress has usurped the judicial function. *See also United States v. Lovett*, 328 U.S. 303, 315 (1946) (emphasis

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[4] In contrast to the statute at issue in *Klein*, the Court in *Hart v. United States*, 118 U.S. 62 (1886), upheld a statute that prohibited the payment of claims accruing before a certain date if the claimant had aided the confederacy in the Civil War. While the statute provided that a pardon did not remove this prohibition, it was silent as to the effect of a pardon on the merits of the underlying claim. The Court held that this statute was well within Congress's appropriation power and that it did not prescribe the effect to be given a pardon in determining the merits of a particular claim, as the statute in *Klein* had done, nor did it treat claims based on pardons differently than others in the class of claims.

added) (Bill of Attainder Clause proscribes all legislative acts "*no matter what their form*, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial"). Under *Klein*, if Congress cannot affirmatively require the courts to construe the evidence in a prescribed fashion or to reach a particular outcome in a pending case, then it cannot accomplish the same result by limiting the courts' jurisdiction to decide those particular cases.

This principle also follows from *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), in which an individual who had been imprisoned by Reconstruction military authorities brought a habeas corpus action challenging the constitutionality of the Reconstruction legislation. The lower court upheld the law, and McCardle appealed to the Supreme Court under the authority of an 1867 Act giving the Supreme Court appellate jurisdiction over habeas corpus matters. While the case was pending in the Supreme Court, Congress repealed the Act authorizing all such appeals, and the Court dismissed the case for want of appellate jurisdiction.[5] In doing so, the Court distinguished several cases involving "the exercise of judicial power by the Legislature, or of legislative interference with courts in the exercising of continuing jurisdiction." *Id.* at 514, *citing De Chastellux v. Fairchild*, 15 Pa. 18 (1850) (legislature attempted to exercise judicial power through a statute granting a new trial to an unsuccessful defendant in a trespass case); *State v. Fleming*, 26 Tenn. 152 (1846) (legislature interfered with judicial function by attempting to make a new law legalizing liquor sales applicable to pending prosecutions).

What these cases demonstrate is that the government's attempt to have the constitutionality of Section 318 turn on whether the statute uses certain magic words that actually "command" or "direct" a court to reach a certain result is hypertechnical and without constitutional foundation. Pet. Br. at 25, 30. It

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[5] The statute at issue in *McCardle* did not eliminate all Supreme Court consideration of habeas corpus petitions; it simply withdrew the Supreme Court's appellate jurisdiction, but left its certiorari jurisdiction intact. *Ex Parte Yerger*, 75 U.S. (7 Wall.) 85 (1869). In addition, the *McCardle* Court recognized that the lower courts still could hear such claims. 74 U.S. at 515.

does not matter whether the statute "directs" the court to dismiss a pending case, "deems" the challenged actions taken by the government to satisfy the underlying statutory requirements, or removes the court's jurisdiction to decide the particular case. All of these approaches are unconstitutional because Congress has, in essence, prescribed a rule of decision for the pending case.

In this case, there can be no doubt that Congress did just that. Congress "determine[d] and direct[ed] that management of areas according to" certain parts of Section 318 "is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases," which it identified by caption and docket number. Section 318 did not replace the requirements of the underlying environmental laws with other requirements. To the contrary, the conference report makes clear that "[t]his section in no way alters application of the Endangered Species Act or other environmental laws to the Forest Service and BLM management activities." Opp. Cert. App 122a. There is also no question that Congress adopted this statute to eliminate the injunctions that had been issued in these cases. S. Rep. No. 101-85, 101st Cong., 1st Sess. at 120 (1989) ("The Committee's immediate concern is the potential for considerable economic disruptions which are likely to occur if the injunctions remain in place").

This statute crosses the line between permissible lawmaking and impermissible congressional adjudication of a pending case. Section 318 directs the courts to resolve two pending cases in favor of the government and to remove the injunctions on timber sales. This is its principal purpose, and, if it is constitutional, its principal effect. It does this by referring to the cases by caption and docket number, and by directing the courts to find that whatever the agencies do under Section 318 satisfies the statutory requirements that are the bases of the plaintiffs' challenges in those cases.

The fatal flaw in Section 318 is even more apparent from what it does not do. It does not establish any rules of general applicability. Thus, it does not revise the substantive standards of the National Forest Management Act, 16 U.S.C. §§ 1601 *et seq.*, or the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701

et seq. Nor does it remove the courts' jurisdiction to decide all cases arising under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, or any other statute. It likewise does not change the legal status of the public lands at issue in terms of their availability for timber sales, for example, by making them National Parks or wilderness areas, which would change the underlying circumstances much like the designation of the postal roads did in *Wheeling Bridge*. Rather than decide whether the legal obligations imposed by the environmental laws needed to be altered, whether certain categories of statutory claims should always be unreviewable in the courts, or whether the tracts at issue should be redesignated on a permanent basis, with all of the consequences that those determinations would have, Congress crafted a quick-fix solution that applies to this controversy and this controversy only, and even then for only one year.

This failure to enact rules of general applicability is significant both in terms of the result and the process. In terms of result, the specific claims in these cases were singled out as ones that would not be entertained by the courts during the fiscal year, not because they were based on erroneous legal standards that had since been changed, but because Congress did not like the result reached by the courts. This type of individualized lawmaking would be impermissible in the criminal context under the Bill of Attainder and Ex Post Facto Clauses, and would be unlikely to survive the Due Process Clause's rational purpose test for retroactive laws. *See* cases cited *supra* at 9.

In terms of process, the one-year, localized appropriations rider, targeted at specific cases, short-circuited the safeguards built into the lawmaking process. If Congress were to change the underlying legal obligations of the agencies under the environmental laws or the reviewability of agency actions under such laws generally, the legislation would go through the congressional committees with substantive responsibility over the laws and the agencies. Not only are the committee proceedings public, but the result -- the development of a general change in the law -- is the type of legislative action for which Members of Congress are held politically accountable. In contrast, last-minute appropriations riders are buried in voluminous budget bills that do not purport to

make substantive law and that are not subject to public hearings and review by the congressional committees with jurisdiction over the underlying laws or agencies.

In this case, Congress made no general changes in the underlying laws. Moreover, as the conference report makes clear, and as respondents, Seattle Audubon Society *et al.*, point out, Congress did not even exempt these agencies, this endangered species, or these timber sales from the underlying environmental laws. Thus, it did not even purport to make changes in the underlying laws specific to the matters at issue in these cases. In our view, such an exemption or limited repealer would also be unconstitutional, if it were simply a subterfuge for a congressionally established rule of decision for a pending case. Such shortcuts take place largely outside the accountable process of substantive lawmaking and inject Congress into the process of deciding cases without any of the safeguards of the judicial process.

Finally, it should be noted that the Executive Branch's defense of this particular statute is based on political expediency rather than principle. *Cf. Metropolitan Washington Airports Authority*, *supra*. Since Section 318 removed injunctions that were constraining the federal agencies' proposed actions, and derailed lawsuits against the agencies, it is not surprising that the Executive Branch liked the particular results of Section 318. However, the next case-specific rider may not be as palatable to the Executive Branch. Indeed, history shows that the Executive Branch has taken the opposite position when Congress passed statutes that allowed claims against the government to be relitigated. *See, e.g.*, *Pope v. United States*, 323 U.S. 1 (1944) (Executive Branch unsuccessfully argued that a statute removing statute of limitations defense, which had barred a previous claim in court, was an improper legislative encroachment on the judicial power); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (Executive Branch challenged statute that removed *res judicata* defense to claim previously litigated against it).

Even when the United States is not a defendant in an action for money damages, the Executive Branch might challenge provisions like Section 318. Thus, the Executive Branch would likely

oppose a statute directing the courts to find that a challenged regulation violated existing law or "deeming" the regulation's requirements to violate the law. Or, if a court invalidated an Executive Branch ban on a particular pesticide, and Members of Congress from the pesticide manufacturer's district sponsored a rider removing the appellate court's jurisdiction to hear the case, the Executive Branch might argue that Congress acted unconstitutionally. Likewise, if a court enjoined the Executive Branch from implementing a policy that limited the reach of a civil rights statute, and Congress passed a law providing that the injunction must remain in effect for one year, the Executive Branch would likely challenge the statute. In each of these situations, the Executive Branch might argue that such case-specific riders were congressional usurpations of judicial (and perhaps executive) power, without drawing any distinctions among the various means used to dictate the outcome of the case.

Regardless of whether a statute explicitly directs a court to reach a particular result in a pending case, deems an action to mean whatever is required to reach that result, or removes the courts' jurisdiction over the case, it is a violation of the doctrine of separation of powers. Accordingly, the court of appeals correctly found Section 318 unconstitutional.

CONCLUSION

For these reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

Patti A. Goldman
(Counsel of Record)
Alan B. Morrison
David C. Vladeck

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amicus* Public Citizen

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